Supreme Court of the United States

October Term, 1978

No. 77-1802

IN THE MATTER OF THE TRUST KNOWN AS THE GREAT NORTHERN IRON ORE PROPERTIES

CHARLES S. ARMS and ELIZABETH P. ARMS,
Petitioners,

vs.

WILLIAM W. WATSON, LOUIS W. HILL, JR., HARRY L. HOLTZ, JOSEPH S. MICALLEF, *Trustees of the Great Northern Iron Ore Properties Trust,*
BURLINGTON NORTHERN, INC.,
Respondents.

ARMS APPENDIX TO PETITION FOR WRIT OF CERTIORARI TO THE SUPREME COURT OF MINNESOTA

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SUPREME COURT OF MINNESOTA

Syllabus by the Court

IN THE MATTER OF THE TRUST KNOWN AS GREAT NORTHERN IRON ORE PROPERTIES

In this second appeal from district court proceedings upon the trustees' petition for instructions in the administration of an express trust, we hold that the trial court's instruction that the trustees have a duty to convert all trust assets to cash, resulting in the complete destruction of the reversion, before trust termination is erroneous and inconsistent with our prior opinion in *In re Trust Known as Great Northern Iron Ore Properties*, 308 Minn. 221, 243 N.W.2d 302, certiorari denied sub nom. *Arms v. Watson*, 429 U.S. 1001, 97 S.Ct. 530, 50 L.Ed.2d 612 (1976). The trustees shall be instructed that by the terms of the trust instrument they are given discretionary powers to convert trust assets to cash and to distribute proceeds to the certificate holders, but they are limited in their exercise of those powers by a legal duty imposed by the well-established law of trusts and successive estates to serve the interests of both term and reversionary beneficiaries with impartiality, and they have no duty to exercise the powers of sale and distribution unless required to serve both term and reversionary interests.

The order of the district court instructing the trustees is reversed with directions to enter an order instructing the trustees in accordance with the views expressed herein.

Frank S. Farrell, Richard V. Wicka, Briggs & Morgan and Richard E. Kyle, J. Neil Morton and Steve A. Brand, St. Paul, for B. N. Inc.

Doherty, Rumble & Butler and Jack C. Foote, Frank Claybourne and Perry Wilson, Jr., St. Paul, for The Trustees of trust known as Great Northern Iron Ore Properties.

Arter & Hadden, Thomas V. Koykka and David G. Coleman, Cleveland, Ohio, Oppenheimer, Wolff, Foster, Shepard & Donnelly, William Oppenheimer and James R. Oppenheimer, John H. Wolf and Mark H. Stromwall, St. Paul, for Arms.

Harold Siegel, Minneapolis, for Margot Siegel.

Considered and decided by the court en banc.

ROGOSHESKE, *Justice*

The subject matter of this extended litigation is the James J. Hill Trust, known as Great Northern Iron Ore Properties. In 1972, the trustees petitioned the district court for instructions as to their powers and duties to convert trust assets to cash for distribution to income beneficiaries as termination of the trust term approaches.[1] The issue concerning the trustees' powers and duties comes

1. The trust instrument provides that the trustees may sell any or all trust properties, may distribute proceeds to income beneficiaries, and shall on trust termination convey all remaining money to the income beneficiaries and all other property remaining to the settlor or its successor. The trust term specified is the duration of 18 lives in being at trust creation in 1906 plus 20 years. See, footnote 4, *infra*. At the time of initial trial in this case, 5 of the 18 persons named as measuring lives were still living.

before us a second time. In the first appeal, *In re Trust Known as Great Northern Iron Ore Properties*, 308 Minn. 221, 243 N.W.2d 302, certiorari denied sub nom. *Arms v. Watson*, 429 U.S. 1001, 97 S.Ct. 530, 50 L.Ed.2d 612 (1976), we reversed as clearly erroneous the trial court's findings that the trust should be terminated before its specified term, and that Burlington Northern, Inc., a successor in interest of the settlor, had no interest in the trust. We remanded for further proceedings to permit the trial court to answer the trustees' petition for instructions. Upon remand, the trial court instructed the trustees that they have the authority, and indeed the duty, to convert all trust assets to cash, in effect destroying the reversion for the benefit of the income beneficiaries as trust termination approaches. Upon this second appeal by Burlington Northern, we reverse with instructions to the trustees that they have the authority to convert trust assets to cash, short of violation of their legal duty of impartiality between trust reversioner and income beneficiaries, but have no duty to convert assets unless required to serve both reversion and income interests.

The history of the Great Northern Iron Ore Properties Trust was detailed in our prior opinion. The trust holds several thousand acres of Minnesota ore lands, which are mined by lessees under long-term royalty leases. After payment of trust expenses, the trustees in their discretion distribute royalties from the mining operations to the income beneficiaries, some 10,000 holders of 1,500,000 negotiable certificates of beneficial interest which are traded on the New York Stock Exchange.[2] Burlington Northern,

2. See trust paragraph 4, footnote 4, *infra*. The original certificates of beneficial interest were issued to shareholders of Great Northern of record on December 6, 1906.

Inc., as successor in interest to Great Northern Railway,[3] holds a reversion in all trust assets other than cash remaining at trust termination.

The present controversy between the income beneficiaries (hereafter certificate holders) and the reversioner, Burlington Northern, arises because of estimates that at present rates of mining a great share of the presently merchantable taconite supply on trust lands will remain unexhausted when the trust term expires. The certificate holders have sought to compel the trustees to mine the trust lands to exhaustion before termination of the trust or, if that proves impossible, to convert all trust properties to cash for their exclusive benefit under trust paragraphs 4, 9, and 17.[4] Reversioner Burlington Northern

3. Great Northern acquired its reversion by assignment in 1913 from the trust settlor, Lake Superior Company, Ltd.

4. The trust provisions pertinent to these proceedings provide as follows: "4. After payment made of or provision made for the expenses of said trust, the said trustees shall, from time to time, and at least once in every year, distribute and pay such portion of the net income or proceeds of the property held by them as such trustees, as they may deem proper to be so distributed, among and to the persons appearing as shareholders of the Great Northern Railway Company, registered as such upon its books at the close of business on the 6th day of December, A.D. 1906, and to their assigns, under and by virtue of assignments made in accordance with the provisions therefor hereinafter contained.

* * * * *

"9. The trustees shall have full power, during the continuance of this trust, to sell at public or private sale, or exchange for other property, or otherwise dispose of all or any part of the shares of stock hereby transferred to them, or any other property that may have become subject to this trust; and to invest the proceeds of any such sale or sales in other property; and in case of such re-investment the property so acquired, as well as all property acquired by the trustees in exchange, or otherwise, for property held by them under this trust, shall be held by the trustees under the same trust and with the same powers and duties in respect thereto as are hereby provided in respect to the property herein described and conveyed.

* * * * *

(Continued on following page)

has sought to obligate the trustees to "continue the orderly mining" of the trust properties, preserving lands not thereby consumed for the reversioner at trust termination. The trustees, beset by these conflicting demands of the successive beneficiaries, petitioned the district court for instructions in 1972. In their amended petition to the district court, the trustees asked—

> "'* * * whether or not they have authority to convert all assets in their hands to cash as termination of the Trust becomes imminent, to the extent practicable. If the court finds they have [authority] then they wish to be instructed as to whether they have the duty so to convert.'"

In initial proceedings before the first appeal, the trial court found the trust instrument ambiguous and admitted a great volume of extrinsic evidence. Rather than issue the requested instructions, the trial court declared the trust terminated before its full term and, finding that the settlor had intended the railroad to have no interest in the lands, ordered the trust assets transferred to a corporation for the sole benefit of the certificate holders. On the appeal from that order, we reversed, holding that the trust instrument was not ambiguous and that the trial court's admission of extrinsic evidence, its findings, and

Footnote continued—

"17. Upon the expiration of the twenty (20) years next following the death of the last survivor of the before mentioned persons upon whose lives the said trust is limited, the trustees shall at once proceed to wind up the affairs of said trust. After paying or providing for all expenses or obligations of the trust they shall distribute ratably among the certificate holders all moneys remaining in their hands as such trustees, and shall convey and transfer unto the party of the first part, or its successors, or assigns, all property, save said moneys, held by them under said trust.

"And thereupon said trust shall cease."

its termination of the trust were clearly erroneous.[5] We remanded to permit the issuance of instructions, consistent with our opinion, as originally requested by the trustees.

Upon remand, the trial court instructed that the trustees have unlimited authority to convert the trust assets to cash for the certificate holders. The trial court based its finding of unlimited authority upon the broad power of sale conferred in trust paragraph 9, an alleged "practical construction" of the trust instrument,[6] and a finding that the trustees of a "business trust" of "wasting assets" are exempted from any limits imposed upon their powers by the law of trusts and successive estates. In its memorandum of instructions, the trial court further instructed that the trustees in fact have a duty to exercise their power of sale to destroy the reversion by converting all trust assets to cash for certificate holders before the end of the trust term. In support of this finding, the trial court has again referred to the extrinsic evidence which we found inadmissible on the last appeal. Based upon this evidence, a reading of trust paragraphs 4 and 9, and inferences from the historical background of the trust relating to the acquisition of the ore lands, the trial court has "gleaned" a settlor's intent to benefit only the certificate holders to the exclusion of "any possible reversioner." This alleged intent of the settlor is supposed to give rise to a duty to exercise the power of sale in destruction of the reversion.

5. Specifically, we held that the trust was unambiguously intended to terminate at the end of 18 specified lives in being at trust formation plus 20 years, not before; that a reversionary interest was unambiguously and validly created in the trust instrument; and that the reversion legally resides in Burlington Northern at present. We held that it was clearly erroneous to have admitted the volumes of extrinsic evidence permitted by the trial court and further found that, even if considered, the extrinsic evidence did not establish the intent attributed to the settlor by the trial court.

6. The trial court found that the trustees have in practice been liquidating trust property and distributing the proceeds to certificate holders for some 70 years of trust administration.

Since both parties now concede and trust paragraphs 4 and 9 unambiguously provide that the trustees have full authority to sell assets, reinvest, and distribute proceeds of sale, the issue on this appeal narrows itself to what the trustees' duties are with respect to the exercise or nonexercise of their powers of sale and distribution.

We consider first the arguments of the parties concerning what duties may be imposed upon the trustees in the exercise of their powers of sale and distribution by the trust instrument, extrinsic evidence, or an alleged "practical construction." Secondly, we consider what duties with respect to exercise of those powers are imposed upon the trustees by law.

I. *Duties imposed by the trust instrument, extrinsic evidence, or practical construction.*

Charles and Elizabeth Arms, intervening certificate holders,[7] and the trial court have looked to the trust instrument, considered extrinsic evidence of the settlor's intent, and applied "practical construction" to impose a duty to exercise the power of sale for the sole benefit of certificate holders. Burlington Northern challenges the propriety of relying upon extrinsic evidence, disputes the alleged practical construction, and relies upon the trust

7. Respondents Charles and Elizabeth Arms, two of the holders of certificates of beneficial interest in the trust, intervened on their own behalf in the trustees' original action seeking instructions from the district court. The Arms represent themselves as holders of 10,000 of the 1,500,000 outstanding certificates of beneficial interest; they do not represent holders of the remaining 1,490,000 certificates. The Arms and reversioner Burlington Northern have been the principal intervening litigants in these proceedings initiated by the trustees.

instrument and this court's prior opinion to argue that finding a duty to convert trust assets would be inconsistent with our former opinion. We hold that the trustees' powers of sale and distribution under trust paragraphs 4 and 9 are discretionary, and no duty to exercise or refrain from exercising those powers is created by the trust instrument, extrinsic evidence, nor any practical construction.

Trust instrument

The Arms certificate holders contend that trust paragraph 9, providing an unlimited power of sale should be read as obligating the trustees to use that power to liquidate all trust assets as trust termination approaches. We do not agree. It is true that trust paragraph 9 contains no limit on the power of sale and that trust paragraph 4 permits distribution of proceeds without requiring reinvestment. But these unambiguous trust provisions clearly do not *require* the trustees to exercise the powers conferred. The decision to exercise the powers is left to the trustees' discretion.[8]

The Arms certificate holders also contend that trust paragraph 17, directing the trustees to "wind up" trust affairs at the end of a trust term 1 year short of the

8. It may be, as Burlington Northern argues, that the unlimited powers of sale and distribution were included in the trust instrument in 1906 merely to assure compliance with 1905 trust and estate laws potentially invalidating powers of accumulation or unlimited restraints on alienation in trusts of this type. See, R.L. 1905, §§ 3203, 3204, 3225, 3226, 3249(6). See, also, *State v. Evans*, 99 Minn. 220, 108 N.W. 958 (1906) (royalties from mining leases were "rents and profits" of land). Whatever weight that argument may have in determining the settlor's intentions, however, we find it unnecessary to speculate upon the reasons for inclusion of the paragraphs 4 and 9 powers. The trust instrument is unambiguous. The powers were included, they were unlimited, and they were made discretionary. There is no obligation in trust paragraphs 4 and 9 that the powers in question be exercised.

statutorily allowed perpetuities period,[9] should be read as requiring liquidation of all trust assets during the final year of the trust period solely for the benefit of the certificate holders. The Arms cite a number of cases in support of the proposition that a direction to "wind up" the affairs of a partnership, corporation, or other business association means to convert all assets to cash for proper proportional distribution among creditors and owners.[10] Relying upon these cases, they seek to attribute a similar meaning to the words "wind up" in trust paragraph 17. In our view, the words "wind up" in the context of paragraph 17 cannot reasonably bear the meaning attributed to them by the certificate holders. The cases cited by the Arms are not applicable. Unlike those cases, this litigation does not concern a partnership or business association in which "wind[ing] up" would require liquidation of all assets in order to fairly distribute proportions corresponding to proportional ownership or creditors' interests in each asset. The words "wind up" can mean different things in different contexts. In the context of trust paragraph 17, the meaning intended is further defined:

> "* * * After paying or providing for all expenses or obligations of the trust they shall distribute ratably among the certificate holders all moneys remaining in their hands as such trustees, and shall

9. See trust paragraph 17, footnote 4, *supra*. Revised L.1905, § 3249(6), effective at the time of trust formation, limited the permissible duration of a trust term to lives in being at trust formation plus 21 years.

10. See, *e. g., Bagg v. Osborn*, 169 Minn. 126, 210 N.W. 862 (1926) (partnership); *Northwestern Railroader v. Prior*, 68 Minn. 95, 70 N.W. 869 (1897) (corporation); *In re People's Live Stock Ins. Co.*, 56 Minn. 180, 57 N.W. 468 (1894) (corporation); *Arthur v. Willius*, 44 Minn. 409, 46 N.W. 851 (1890) (corporation); *Polikoff v. Levy*, 132 Ill.App.2d 492, 270 N.E.2d 540 (1971) (joint venture); *May v. Brewster*, 187 Mass. 524, 73 N.E. 546 (1905) (estate of real estate not allocable in kind); *Kountze v. Smith*, 135 Tex. 543, 144 S.W.2d 261 (1940) (business trust).

convey and transfer unto the party of the first part, or its successors, or assigns, all property, save said moneys, held by them under said trust."

Had the settlor intended to require conversion of all trust assets to cash, it could have so provided. Instead, a reversion was provided for unconverted, noncash properties.[11] The Arms also assert that the provision to "wind up" the trust 1 year before it is legally required to be terminated, evidences an intent that the potentially lengthy process of converting all trust assets to cash be undertaken. We find this argument unpersuasive as well. During the period when the trust was drawn, trusts were commonly drafted to last for lives in being plus 20 years rather than the statutorily allowed lives plus 21 years, without regard to whether liquidation of trust assets were contemplated. See, *e.g., Minnesota Loan & Trust Co. v. Douglas,* 135 Minn. 413, 161 N.W. 158 (1917). The trust instrument plainly does not impose any duty to exercise or not to exercise the powers of sale and distribution granted in paragraphs 4 and 9.

Extrinsic evidence

The trial court relied upon certain excerpts from letters and statements made by James J. Hill which allegedly show that he expected the trust lands' merchantable-ore supply to be exhausted before the end of the trust term. Based upon this extrinsic evidence, the trial court concluded and the Arms certificate holders assert that the

11. The Arms have asserted on appeal that the reversion was provided only for nonmining, railroad-type properties, and that all mining properties were to be converted to cash for certificate holders under trust paragraph 17. Clearly, there is nothing in the trust instrument to support such an interpretation, nor do we find that view supported by the extrinsic evidence offered by the Arms.

trust settlor[12] intended that the reversioner should receive nothing of value. It is speculated from the extrinsic evidence that a direction to sell off valuable lands at trust termination would have been included had James J. Hill realized that the lands would indeed be rich in unmined merchantable taconite at the end of the trust term. But such a direction was not included.

In our prior opinion in this case, we held that admission of the very evidence now relied upon was clearly erroneous. Trust paragraph 17 is unambiguous. It provides a reversion of all noncash trust assets held at trust termination. The reversion in paragraph 17 is completely consistent with paragraph 9, which provides a discretionary power to convert trust properties to cash. We held that the extrinsic evidence now relied upon was inadmissible to contradict or vary the plain terms of these paragraphs and, even if considered, was incapable of establishing the settlor's alleged intent to deprive the reversioner of all interest in the trust. The trial court's reliance upon the same extrinsic evidence to insert into these paragraphs a duty to convert assets to cash is clearly inconsistent with this court's prior opinion. The unambiguous trust provisions themselves do not obligate the trustees to convert any trust assets to cash. Extrinsic evidence may not be used to contradict or alter the terms of an unambiguous trust instrument.[13]

12. It should be noted that the actual trust settlor was not James J. Hill but Lake Superior Co., Ltd., a partnership of which James J. Hill was a founding partner. *In re Trust Known as Great Northern Iron Ore Properties,* 308 Minn. 221, 223, 243 N.W.2d 302, 304, certiorari denied sub nom. *Arms v. Watson,* 429 U.S. 1001, 97 S.Ct. 530, 50 L.Ed.2d 612 (1976).

13. 7A Dunnell, Dig. (3 ed.) §§ 3397, 3406, 3407; 19B Dunnell, Dig. (3 ed.) § 9888a, pp. 139, 148; *In re Declaration of Trust by Bush,* 249 Minn. 36, 81 N.W.2d 615, 82 N.W.2d 221 (1957). *Cf. In re Trusteeship under Agreement with Mayo,* 259 Minn. 91, 105 N.W.2d 900 (1960); *In re Trusteeship Created by Fiske,* 242 Minn. 452, 65 N.W.2d 906 (1954).

Practical construction

The trial court's instructions are based in part upon a determination that the trustees have in fact been distributing proceeds of land sales to certificate holders for 70 years. The parties have devoted a large share of their arguments before this court to disputing the evidentiary support of that determination by the trial court. Analyzing trust accounts through differing accounting theories, Burlington Northern argues that land sale proceeds have never been distributed to certificate holders, while the Arms assert that land proceeds have regularly been distributed out of the trust's commingled bank account.[14]

We find it unnecessary to decide whether or not land sale proceeds have in practice been distributed to certificate holders. If the trustees have never distributed land sale proceeds, that would not restrict their power to do so under trust paragraph 4. If the trustees have distributed land sale proceeds, that would prove no more than that the trustees have exercised the authority which is clearly granted to them in paragraph 4. Surely, prior distributions of relatively minor proceeds from land sales could not give rise to a *duty* to sell off all trust lands and distribute all proceeds to certificate holders in the future. Contrary to the Arms' suggestion, we find that no theory of estoppel could possibly apply to prevent Burlington Northern from

14. Based upon the trustees' reports for 1906 and 1924, and upon the annual reports since 1906, Burlington Northern has sought to demonstrate that total invested, undistributed trust receipts always exceeded receipts from land sales. Under the reversioner's theory of accounting, this signifies that none of the land sale proceeds were among the receipts distributed to certificate holders. The Arms analyze the trust accounts differently, characterizing the undistributed receipts as largely expended rather than invested. By this theory, the funds of receipts retained in investments would not exceed receipts from land sales so that land sale proceeds could be presumed among the funds distributed to certificate holders.

contesting future liquidation of *all* reversion-bound lands simply because it may have acquiesced in some relatively small prior distributions.

The trial court's reliance upon inadmissible extrinsic evidence, inconclusive "practical construction," and an unwarranted reading of the trust instrument imposing a duty to liquidate all trust assets, in effect destroying the reversion, is erroneous. In our earlier opinion in this case, we recognized Burlington Northern's interest in the trust as reversioner, and we reversed the trial court's attempt to destroy the reversion by terminating the trust. Now the trial court has instructed the trustees that they have a duty to do, in effect, that which this court prevented the trial court from doing directly. The instruction to convert all trust assets to cash must be disapproved. It is not only erroneous and unsupported by the trust instrument or other evidence but also is inconsistent with this court's prior opinion.

II. *Duties imposed by law.*

Burlington Northern relies upon the general common law of trusts and successive estates which would impose a duty on trustees to treat term and reversion interests impartially and to refrain from committing "waste" upon properties allocable to either interest. The Arms counter that the common law of trusts and estates is not applicable to a "business trust" of "wasting assets" such as they argue this trust to be. The Arms also argue that the trustees are legally obligated to liquidate trust assets before trust termination in order to maximize current income from a "business trust" and to prevent Burlington Northern from receiving lands which it allegedly is prohibited from holding by the Hepburn Act, Minnesota land laws since amended, and the Great Northern Railway charter through the Burlington Northern merger agreement.

We hold that the well-established common law of trusts and successive estates governs the exercise of the trustees' discretionary powers of sale and distribution in this trust. We find respondents' contrary arguments unpersuasive.

The Arms' first argument is that Great Northern Iron Ore Properties should be considered a "business trust" and, as such, exempted from duties imposed by the law of trusts and successive estates. This argument is not persuasive. We recognize that a commonly employed business form known as the common-law or Massachusetts business trust is governed by a special body of laws in some respects different from the common law of trusts,[15] however, it is not at all clear that the trust in this case is properly characterized as such a business trust. Not every trust which conducts a business is a common-law or Massachusetts business trust. Bogert, Trusts and Trustees (Rev. 2 ed.) § 247, cl. B. This trust is like the common-law or Massachusetts business trust in that the income interest in the trust is owned by several thousand holders of transferable certificates of beneficial interest. Id. cl. A. However, unlike the business trust form, this trust was not created by a contractual arrangement combining capital contributions from the original certificate

15. See, e. g., Minn.St. c. 318; Bogert, Trusts and Trustees (Rev. 2 ed.) § 247; Restatement, Trusts 2d, § 1, comment *b*. Common-law or Massachusetts trusts are treated specially in some respects because of their similarity to the corporate form of business. For example, they may be exempted from the common-law rule against perpetuities (Minn.St. 318.02, subd. 3[1]); subjected to various corporate laws providing securities regulation or taxation as a corporation (Bogert, *supra*, § 247, cl. Q-U; *Morrissey v. Commr. of Int. Rev.*, 296 U.S. 344, 56 S.Ct. 289, 80 L.Ed. 263 [1935]; Opinions Attorney General, No. 616d-17, March 2, 1961); or permitted liberal interpretation of the statement of powers and purposes in the trust instrument, like a corporate charter (*Bomeisler v. M. Jacobson & Sons Trust*, 118 F.2d 261, 265 [1 Cir.], certiorari denied, 314 U.S. 630, 62 S.Ct. 61, 86 L.Ed. 505 [1941]).

holders but rather by a gift from Lake Superior Co., Ltd., of property originally purchased with either the private funds of James J. Hill or the 1906 earned surplus account of Great Northern.[16] Unlike the business trust form, the original certificate holders here were not themselves the trust settlors.[17] Rather, as in the ordinary family trust, a trust settlor other than the appointed income beneficiaries has reserved a reversion to itself in the trust properties. The trustees here do not actively conduct a mining operation but, similar to any family trust, simply hold lands which they let under long-term royalty leases and collect the income for distribution to the certificate holders. The fact that this trust has been held taxable as an "association" under the Federal Internal Revenue Code[18] clearly does not control treatment of the trust under trust law. On balance, this trust seems to bear more of the characteristics of an ordinary trust conducting a business than of a common-law or Massachusetts business trust. If the trust is not such a "business trust," it is unquestionably governed, in trust matters, by the common law of trusts and successive estates. Id. cl. B. But we need not finally decide the proper characterization of the trust to resolve the extent of the trustees' duties because it has been recognized that even a common-law or Massachusetts business trust, although governed by special corporate-like rules in certain respects, is subject to the underlying equitable and fiduciary duties toward trust

16. See, Bogert, *supra*, cl. B. We note that other courts have held that a business trust is not created where, as here, the entity arises by reason of a gift from a settlor who may retain a reversion rather than by a contractual relationship among capital contributors who themselves become the income beneficiaries. See, *Berry v. McCourt*, 1 Ohio App.2d 172, 204 N.E.2d 235 (1965).

17. See, Bogert, *supra*, cl. B; *Mayo v. Moritz*, 151 Mass. 481, 24 N.E. 1083 (1890).

18. *Reynolds v. Hill*, 184 F.2d 294 (8 Cir. 1950).

beneficiaries imposed by the common law of trusts.[19] It may be true, as the Arms argue, that this fiduciary duty toward trust beneficiaries would impel the trustees to maximize cash proceeds during the trust term, even by liquidation of unmined lands, were the certificate holders the only trust beneficiaries as in the typical Massachusetts trust. But here, the certificate holders are not the only beneficiaries, and the law of trusts imposes a fiduciary duty to guard the interests of the trust reversioner as well as those of the certificate holders.

A second legal argument asserted by the Arms in an effort to exempt the trustees from any legal duties toward the trust reversioner is a reference to the law of wasting assets. The Arms, and the trial court by its incorporation of part of the Arms' trial brief into its memorandum of instructions to the trustees, have cited authorities recognizing that when an estate or trust consists of mining property, a wasting asset, the holder of the term interest does not commit waste by mining the property to gradual consumption or exhaustion during the term.[20] These cases, however, are not pertinent to the issue. The trustees' authority to exhaust minerals on the trust lands through ordinary mining operations during the trust term

19. Bogert, *supra*, cl. U; Annotation, 156 A.L.R. 28, 30; 13 Am.Jur.2d, Business Trusts, §§ 4, 61. The Arms rely upon three cases for their broad assertion that the "law of traditional 'successive estates' [and trusts] has no application" to a business trust. *Bomeisler v. M. Jacobson & Sons Trust, supra; Ashworth v. Hagan Estates Inc.*, 165 Va. 151, 181 S.E. 381 (1935); *Morrissey v. Commr. of Int. Rev. supra.* These cases do not support the Arms' broad assertion. They simply apply corporate laws to business trusts in particular limited areas. See, footnote 15, *supra.* The Arms do not and could not cite any authority which would exempt trustees of business trusts entirely from the fiduciary duties of the law of trusts.

20. See, e. g., *Minnesota Loan & Trust Co. v. Douglas*, 135 Minn. 413, 161 N.W. 158 (1917); *State v. Royal Mineral Assn.*, 132 Minn. 232, 156 N.W. 128 (1916); *State v. Evans*, 99 Minn. 220, 108 N.W. 958 (1906).

has not been questioned and must be recognized in furtherance of the purpose for which this trust was established. The authorities cited by the Arms, however, do not justify the sale of all trust lands containing more minerals than can be mined to exhaustion within the trust term. Such complete and deliberate liquidation of the entire reversion for the benefit of income beneficiaries cannot be allowed with impunity.

The Arms third argument is that the trustees are under no legal duty to the reversioner and indeed are obligated to liquidate the reversion because the Hepburn Act,[21] certain amended Minnesota land laws,[22] and limitations in the Great Northern Railway charter through the Burlington Northern merger agreement[23] allegedly make it illegal for the railroad to acquire and own mineral lands. Without reaching the legality or illegality of Burlington Northern's future fee ownership of trust lands, we hold that the legal proscriptions cited by the Arms do not invalidate the reversion provided in the trust instrument. With regard to the Hepburn Act, we repeat our holding in the prior opinion in this case (308 Minn. 230, 243 N.W.2d 307):

"* * * Even if the carriage of the ore were held to be illegal, * * * it does not follow that

21. Since May 1, 1908, the commodities clause of the Hepburn Act 49 U.S.C.A., § 1(8), has prohibited a railroad from carrying ores from lands in which it owns any interest.

22. General L.1887, c. 204, § 3, made certain lands acquired by a railroad forfeitable to the state. This law was amended to remove that particular restriction by L.1945 c. 280 s. 1.

23. Fee ownership and operation of mining properties is alleged to be beyond the powers conferred by the corporate charter of Great Northern. In the merger agreement combining Great Northern with two other lines, the surviving corporation, now called Burlington Northern, was made "subject to all the restrictions, disabilities and duties, of the Constituent Corporations * * *."

this alone would render invalid what is an otherwise valid [reversionary] provision in this trust."

We extend our reasoning there to all of the other potential legal proscriptions against the railroad's owning mining lands invoked by the Arms. In fact, it is not clear that these legal proscriptions had any potential effect on the reversioner until 1913, when the railroad first acquired the settlor's reversionary interest. As stated in our prior opinion, "* * * [W]e are not prepared to say that this transfer 7 years [after creation of the trust] is controlling in ascertaining the intent of the grantor when this trust was drawn." 308 Minn. 229, 243 N.W.2d 307. Although courts will not actively enforce illegal contracts,[24] we do not have here a contract which was illegal at its inception but rather a validly created trust reversion. The trust properties must be allowed to pass under the trust instrument. The proper remedy for any claimed future illegality in Burlington Northern's acquisition of the trust lands would be an enforcement action under the Hepburn Act or Minn.St. 301.12 (ultra vires)[25] at that future time. None of the arguments advanced by the Arms exempts the trustees from their legal duties toward the trust reversioner according to the law of trusts and successive estates.

Having found that this trust is governed by the common law of trusts and successive estates, we turn now to examine what duties are imposed upon the trustees by that law.

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24. The Arms cite several cases to this effect in their brief. See, e. g., *Minter Brothers Co. v. Hochman*, 231 Minn. 156, 42 N.W.2d 562 (1950); *Kniefel v. Keller*, 207 Minn. 109, 290 N.W. 218 (1940); *Marshall v. Lovell*, 11 F.2d 632 (D.Minn.1926), affirmed, 19 F.2d 751 (8 Cir. 1927).

25. It should be noted that under Minn.St. 301.12 acts or holdings which are ultra vires are not declared void but are only challengeable by aggrieved parties.

It is fundamental trust law that trustees are under a legal duty to manage the trust "with equal consideration for the interests of all beneficiaries." Restatement, Trusts 2d, §§ 183, 232; Bogert, Trusts and Trustees (2 ed.) § 541 (1977 Supp.); II Scott, Trusts (3 ed.) § 183; III Scott, Trusts (3 ed.) § 232. We adopt and approve Restatement, Trusts 2d, §§ 183, 232 and comments, quoted in part below, as an accurate statement of the law in this jurisdiction.

"§ 183. Duty to Deal Impartially with Beneficiaries

"When there are two or more beneficiaries of a trust, the trustee is under a duty to deal impartially with them.

* * * * *

"§ 232. Impartiality between Successive Beneficiaries

"If a trust is created for beneficiaries in succession, the trustee is under a duty to the successive beneficiaries to act with due regard to their respective interests.

"Comment:

* * * * *

"*b. Duty to each of successive beneficiaries.* If by the terms of a trust the trustee is directed to pay the income to a beneficiary during a designated period and on the expiration of the period to pay the principal to another beneficiary, the trustee is under a duty to the former beneficiary to take care not merely to preserve the trust property but to make it productive so that a reasonable income will be available for him, and he is under a duty to the latter beneficiary to take care to preserve the trust property for him."

This court has long recognized that the equitable duty of impartiality governs exercise of trustees' powers in a trust such as this one. In *Congdon v. Congdon*, 160 Minn. 343, 376, 200 N.W. 76, 88 (1924), involving a trust of mining stock very similar to this trust at its creation, we said:

> "* * * In short, it is the duty of the trustees to consult the interests of both life tenants and remaindermen impartially so as not to give either an advantage at the expense or to the prejudice of the other; and it is the duty of courts of equity to preserve the proper relation between capital and income, so that the integrity of the corpus of the trust may not be destroyed or impaired. The object of the rule is to secure a fair adjustment of the benefits of all the cestui que trustent in succession."

Since the trust instrument creates both term and reversionary interests, the law of trusts protects both interests against prejudicial exercise of powers granted in the instrument. Accordingly, the trustees are instructed that their authority to convert trust assets to cash may be exercised only when to do so will serve the interests of both the certificate holders and Burlington Northern. It may be noted finally that, if a need arises, the trustees may petition the district court for further instructions defining what is required to balance the equities of term and reversion with respect to any particular future decision in trust management.

The order of the district court instructing the trustees is reversed with directions to enter an order instructing the trustees in accordance with the views expressed herein.

Reversed.

OTIS and TODD, *JJ.*, took no part in the consideration or decision of this case.

ORDER ON REHEARING

(March 27, 1978)

STATE OF MINNESOTA

OFFICE OF CLERK OF SUPREME COURT

ST. PAUL, MINN.

In the Matter of the Trust Known
as Great Northern Iron Ore Properties.

No. 47571

SIR:

You will please take notice that on this date the following order was entered in the above entitled cause:

ORDERED, that the petition for reargument herein be and the same hereby is denied and stay vacated.

Yours respectfully,

JOHN MCCARTHY
Clerk Supreme Court

OPINION OF THE TRIAL COURT

(On This Review)

(February 17, 1977)

File No. 386008

DISTRICT COURT
SECOND JUDICIAL DISTRICT

STATE OF MINNESOTA
COUNTY OF RAMSEY

IN THE MATTER OF THE TRUST KNOWN AS
GREAT NORTHERN IRON ORE PROPERTIES

MEMORANDUM OF INSTRUCTION TO TRUSTEES

To: Frank Claybourne, Attorney for the Trustees of the captioned trust.

The opinion of the Minnesota Supreme Court filed in this matter April 23, 1976 [In re: Trust known as Great Northern Iron Ore Properties, ... Minn. ....., 243 NW2d 302], mandates that this Court now answer the questions posed in your Petition of October 5, 1972, wherein you sought instructions from the Court as follows:

> "Petitioners ask whether or not they have the authority to convert all assets in their hands to cash as termination of the Trust becomes imminent, to the extent practicable. If the court finds they have then they wish to be instructed as to whether they have the duty so to convert."

Upon due reflection, and after careful consideration of the Opinion of the Minnesota Supreme Court, as well as the briefs filed by the parties on January 31, 1977, this Court answers those questions as follows:

I

The Supreme Court has expressly held that "the Trust instrument is not ambiguous." This has substantially simplified the Court's role in providing instructions to the Trustees, because the Trust may now be viewed as meaning what it says, as verified by the practical construction put on the language by the Trustees over the past seventy-odd years. The plain meaning of the unambiguous language of Paragraph 9 of the Trust Instrument leaves no doubt that the Trustees have full power to dispose of any and all assets of the Trust at any time prior to its termination. They have been doing exactly that for seventy years, in the certain belief that they have full authority to do so [R 324, 338]. Since the inception of the Trust, the Trustees have liquidated property of all kinds. They have allowed to be mined from these ore properties approximately 500,000,000 tons of natural iron ore; they have sold lands which, through the year 1924, resulted in receipts of $425,624.73 [Arms Exhibit 64, 1924 Annual Report, p. 8]; they have sold leasehold interests in property to the United States Steel Corporation, as well as other unspecified lease holdings [Arms Exhibits 86-A and 86-B, Arms Exhibit 65, 1949 Annual Report at pp. 5 and 6, 1950 Annual Report at p. 6]; the proceeds of all of these sales have been distributed in full to the certificate holders, and, more importantly, all of it was done without the slightest concern for the so-called reversioner. Additionally, the Trustees have disposed of mined-out, cut-over properties for fairly nominal sums, or have allowed these properties to become tax forfeited. Again, no concern was expressed by the Trustees for any rights which the so-called reversioner might have, and properly so. Because of the nature of this business trust, and the obvious intent of the Settlor, regardless of whether that intent is viewed from the standpoint of the instrument itself or

from the historical setting in which the instrument was drafted, no obligation rested or now rests upon the Trustees to preserve any part of the Trust for any possible reversioner. In other words, since this is a wasting asset trust, the common law rules regarding trusts and their preservation for the benefit of the remaindermen are simply not applicable. In that regard, this Court expressly adopts as applicable here those principles enunciated by the Arms Petitioners in their brief filed January 31, 1977, pp. 11-14. Moreover, as a practical matter, in the history of this Trust, the common law rules which apply to some trusts have never been applied by the Trustees at any time. The answer, therefore, to the question of whether the Trustees have the authority to convert all assets in their hands to cash as termination of the Trust becomes imminent, to the extent practicable, is clearly yes. The Trust language would admit of no other answer.

II

The Trust does not spell out a positive requirement that the significant assets must be sold before its termination; however, it was created to give the entire beneficial interest in the assets of the Trust to the Trust certificate holders. There were, after all, only two serious purposes in creating the trust:

1) To exhaust the ore lands and distribute all of the proceeds thereof to the Trust certificate holders, thereby enabling the Great Northern Railway to enjoy the revenues from transporting the ores.

2) To avoid the proscriptions of the Commodities Clause of the Hepburn Act.

The Minnesota Supreme Court, recognizing the complexity of this situation and the changed circumstances

now existing, pointed out that the Settlor "may have been mistaken as to how long the Trust properties would continue to be of significant value." This statement recognized what everyone knows, viz. that the Settlor contemplated that there were only 500,000,000 tons of natural ore in these properties, and that all of it would be fully mined in the course of about fifty years, and thus all that was of value in the Trust would benefit the certificate holders only. This turned out to be a fairly precise prediction, and James J. Hill could not have known that the vast taconite formations on the same properties would become mineable ore at some time in the future; at the time that Hill was involved with ore lands, taconite was considered to be no more than "country rock." While there was an awareness of the fact that such vast quantities of taconite existed, no one at that time or for forty or fifty years later ever thought that the taconite would become merchantable ore; mercantable ore in Hill's time contained at least 49 per cent iron, whereas taconite contains just a fraction of that.

Hill's mistake can be rectified, however, because his intent was clear. [Arms Exhibits 1, 7, 24d, 24e; Burlington Northern Brief pp. 90, 91] Whether it is gleaned from the language of the Trust, itself, or from the historical background of the Trust and the antecedent history relating to the acquisition of the ore lands, it is clearly evident that it was the intent of the Settlor to assure that all assets of significant value be disposed of before termination of the Trust. The very creation of the Lake Superior Company as well as the Trust, itself, was clearly designed to insure this. That being the case, the Court can only conclude and direct that the Trustees gradually liquidate the Trust assets during the remaining years of the term of the Trust, so that the purposes of the Settlor may be effected.

Paragraph 9 of the Trust permits the reinvestment of proceeds from any sale of property belonging to the Trust, but does not mandate its reinvestment. Any such reinvestment, of course, is subject to the terms of the Trust, but, if property is not reinvested, then it is subject to the terms of Paragraph 4, which provides that proceeds of sales shall be distributed to the certificate holders. The Court specifically calls the Trustees' attention to this fact because, if premium offers are made for any of the ore lands, liquidation of those properties could be on an even more spontaneous basis, and, rather than reinvesting the proceeds of those sales; they could be distributed within the one-year period provided for in the Trust to the certificate holders.

As our Supreme Court so accurately reflected, the Settlor was "mistaken as to how long the Trust properties could continue to be of significant value." The clear intent and purpose of the Settlor was to assure the beneficiaries—that is, the present certificate holders—the enjoyment of *all* the revenues from the ore properties before the termination of the Trust. Accordingly, the answer as to whether the Trustees have a duty to convert such assets to cash must also be yes. Since the Trustees have the absolute authority to convert any and all assets to cash prior to the termination of the Trust, it might be more clear to say that they have a duty not to avoid conversion of such assets to cash as termination becomes imminent.

Dated: February 17, 1977.

HYAM SEGELL
Judge of District Court

[The following text constitutes pages 11-14 of the Brief of Mr. and Mrs. Charles Arms, submitted to the District Court, on January 27, 1977. These pages are reprinted because they were adopted and incorporated in the Memorandum of Instruction to the Trustees, from which this appeal is taken.]

(i) The Law of Trusts of "Wasting Assets," Such as Mine Properties, Requires That Those Assets Be Mined to Exhaustion

A term tenant of mining properties may exhaust existing mines, or open up new mines and exhaust them, without committing waste or infringing upon the interests of a future estate, unless specifically forbidden by the instrument creating the present estate. A trustee for a term tenant stands in his shoes and has the same rights; this is particularly true when there is no requirement to set up a depletion fund or to apportion proceeds.

When these privileges are combined into a vehicle for conducting *a business*, the implications are that the business can and should be pursued vigorously and for the sole purpose of turning a profit so long as the business can be maintained.

That there is a remainder or future estate is of no consequence to the business operators, absent specific direction to consider that interest in the deed, lease or trust agreement. When there is, as there is in the present trust, an unbridled power of sale, a direction to "wind up" the affairs of the business, and the anticipation of a "sooner determination" before the full term of the trust, the trustees must do everything in their power to exhaust the mineral properties and derive the maximum benefits for the present beneficiaries so that the smallest amount of assets, if any, remain at the conclusion of the business.

This results from the established principle that one in possession of mining properties may, by any means, exhaust those properties for his sole benefit. There is no check on his activities so long as his purpose is to achieve the maximum economic benefit for himself. The Great Northern Iron Ore trustees stand in the shoes of 10,000 individuals, not just one. The only reason there are trustees is that it would have been impractical to divide up the securities in the ore properties among all the shareholders of the Great Northern Railway.

The Minnesota Supreme Court, in the same year, and prior to the date of the trust agreement, confirmed the right of a lessee for life or years to exhaust existing mines and to open up and exhaust new mines. In *State v. Evans*, 99 Minn. 220, 108 N.W. 958, decided Sept. 7, 1906, three months before this trust was established, Chief Justice Start wrote of territorial law:

> "The removal of ore from the demised land was not deemed waste, but a legal and reasonable way of securing the profits of the land. The lessee for life or years of land was, by the common law, authorized to operate and take the profits of open mines, although the lease was silent as to mines, but he could not open new mines even when the land was let with the mines; if, however, the land was let with the mines, and there were then no open mines on the land, the lessee might open new mines and take the profits thereof. Coke upon Littleton, 53b; Clegg v. Rowlan, L.R.2 Eq. 160.
>
> The conclusion to be drawn from the English cases, as clearly and correctly stated by the learned trial judge, is this: '* * * that it never was a circumstance of significance that the use of the demised premises, in accordance with the intent of the parties and in

> accordance with the nature of the use to which they could be put, resulted in the gradual consumption or even exhaustion of the portion of the land of chief worth.'" 108 N.W. at 960.
>
> The Court added:
>
> "If, then, the state may explore its lands, and, when iron ore is found thereon, open the mines, and then lease them, the distinction between open and unopened mines would seem to be immaterial, so far as the question of constitutionality of this mineral lease statute is concerned." 108 N.W. at 961.

Significant on the question of intent (if there be any doubt from the trust instrument) is the existence of a power to lease the mining properties. Deciding such a question the Minnesota Supreme Court observed in *In Re Pettit's Estate* (1917), 135 Minn. 413, 161 N.W. 158:

> "It must also be noted that testator conferred express authority upon the trustee to lease, upon royalties, any of the lands wherein ore deposits might be discovered during the duration of the trust; and that the leases now existing might be forfeited and new leases made by the trustee. In fact, part of the duties of the trustee is to see that the supposed ore-bearing lands be explored, and, if merchantable ore be discovered in paying quantities, that it be mined and royalties obtained. In that situation, no valid distinction can be made between opened and unopened mines, so far as concerns the royalties to be received under this trust. The purpose of the testator was to have all the leased mines opened and worked. We think the *Evans* Case also determines this point against appellant * * *." 161 N.W. at 162.

This principle stems from quite early Pennsylvania cases where trustees had the power to sell or to lease. *Appeal of Wentz* (1884), 106 Pa. 301 and *McClintock v. Dana* (1884), 106 Pa. 386. Consequently, the settlor of the Great Northern trust gave the trustees the power to sell, exchange or otherwise dispose of the mining securities or property for which they might be exchanged, to make it quite clear that the trustees should exploit the ore properties for the certificate holders. The power of sale was included with the intent that it be used.

Finally, the law has long been that the proceeds from securities in mining companies is income and entirely allocable to life beneficiaries. *In Re Knox's Estate* (1937), 328 Pa. 177, 195 A. 28. The Great Northern Trust clearly obligates the trustees to distribute *all* proceeds to the certificate holders, and the trustees have acted accordingly, and rightly so. Minnesota is four-square against apportionment. *In Re Koffend's Will* (1940), 218 Minn. 206, 15 N.W.2d 590. The Minnesota Uniform Principal and Income Act, as this Court held, has no relevance. (Trial Court Opinion, Minnesota Supreme Court Appendix, A-84.)

An individual may exhaust the minerals during his tenure, but need not. When trustees hold the properties, and as an ongoing business venture to boot, their duty becomes an imperative. They must make collective decisions on behalf of the 10,000 individuals, in a business-like fashion. The purpose of business is to maximize profits. If their guide is to derive the maximum benefit for the certificate holders, they must *exercise* the privilege of exhausting the properties. It becomes their *duty*. This the trustees have already done with the natural ores. "The whole process has been one of * * * liquidating the property." (R. 338).

JUDGMENT IN MINNESOTA SUPREME COURT

(On the Present Review)

(Dated March 27, 1978)

STATE OF MINNESOTA, SUPREME COURT

IN THE MATTER OF THE TRUST KNOWN AS
GREAT NORTHERN IRON ORE PROPERTIES
SUPREME COURT No. 47571

Pursuant to an order of Court heretofore duly made and entered in this cause it is determined and adjudged that the order of the Court below, herein appealed from, to-wit, of the District Court within and for the County of Ramsey be and the same hereby is in all things reversed with directions to enter an order instructing the trustees in accordance with the opinion, a certified copy of which is attached hereto.

And it is further determined and adjudged that appellant Burlington Northern, Inc., herein, do have and recover of respondents Charles S. Arms and Elizabeth P. Arms herein the sum and amount of Four Thousand Three Hundred One and 03/100 Dollars, ($4,301.03) costs and disbursements in this cause in this Court, and that execution may be issued for the enforcement thereof.

Dated and signed March 27, 1978.

BY THE COURT

Attest:

JOHN MCCARTHY, *Clerk*

OPINION OF SUPREME COURT OF MINNESOTA

(On the First Review)

(April 23, 1976, Rehearing Denied July 19, 1976)

308 Minn. 221, 243 N.W.2d 302
Nos. 44775, 44776

SUPREME COURT OF MINNESOTA

IN RE TRUST KNOWN AS GREAT NORTHERN IRON ORE PROPERTIES

Syllabus by the Court

In its construction of an express trust which was limited to a term measured by the lives of 18 named people (some of whom are still living) plus an additional 20 years, and which provided that upon termination all property other than money should be returned to the settlor, the findings of the district court that the trust should be immediately determined and that the successor in interest of the settlor had no interest in the trust were clearly erroneous.

Doherty, Rumble & Butler, Francis D. Butler and Jack C. Foote, Frank Claybourne and Perry M. Wilson, Jr., St. Paul, for Great Northern Iron Ore Prop.

Briggs & Morgan, J. Neil Morton, Richard E. Kyle, Steve A. Brand, Frank S. Farrell, Richard V. Wicka, St. Paul, and Kurt W. Kroschel, Billings, Mont., for B. N. Inc.

Oppenheimer, Wolff, Foster, Shepard & Donnelly, James R. Oppenheimer and John H. Wolf, St. Paul, Arter & Hadden and Thomas V. Koykka, Keith Benson and David G. Coleman, Cleveland, Ohio, for Arms, et al.

Considered and decided by the court en banc.

PETERSON, *Justice.*

The trustees of a trust known as Great Northern Iron Ore Properties petitioned the district court for instructions as to their powers and duties with respect to the conversion of the assets of the trust to cash.[1] The trust instrument directs that upon termination of the trust the trustees shall convey all remaining money to the beneficiaries and convey all other property back to the settlor or to its successor. The petition was prompted by a dispute between certain owners of the beneficial interest of the trust and the successor in interest of the settlor.[2] The district court did not give the requested instructions but, instead, declared the trust terminated and ordered that the trust assets be transferred to a corporation to be owned by the beneficiaries. We reverse and remand for further proceedings to permit the instructions for which the trustees petitioned.

Near the turn of the century, James J. Hill and others acquired stock in several companies which owned iron ore

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1. The trustees additionally petitioned for confirmation of their appointment and allowance of their accounts. These were confirmed and allowed and are not now in issue.

2. Several parties intervened, principally appellant Burlington Northern, Inc., and respondents Charles S. and Elizabeth P. Arms. Burlington Northern is the successor in interest of the settlor of this trust. Respondents Arms are two of the holders of the certificates of beneficial interest in the trust. They do not represent the interests of any of the other approximately 10,000 certificate holders.

properties in Minnesota. Hill caused the stock in these mining properties to be transferred to the Lake Superior Company, Limited (hereafter Lake Superior), a Michigan partnership composed of Hill and some of his associates, and on October 20, 1899, Lake Superior entered into a contract with Great Northern Railway (hereafter Great Northern). By this contract Lake Superior "in consideration of" and "as a condition [of]" the transfer of property to it, agreed not to sell any of the property without the approval of Great Northern and agreed that, when directed by Great Northern, it would pay the net income from that property to the shareholders of Great Northern as they appeared of record for regular dividend purposes. Lake Superior agreed, in addition, that Great Northern could direct it in the acquisition of new property and that at Great Northern's direction, Lake Superior would transfer the property to whomever Great Northern, upon majority vote of Great Northern stockholders, should at any time designate.

Great Northern, by resolution passed by its directors and approved by its shareholders in November 1906, ordered Lake Superior to transfer its assets to named trustees. The assets were conveyed to the trustees by a trust instrument dated December 7, 1906, the trust now in issue.

The terms of the trust give the trustees a full power of sale over the property, as well as the power to reinvest in other property. It requires the trustees from time to time and at least once a year to distribute such portion of the net income from the property as they might deem proper to the persons registered as shareholders of Great Northern on December 6, 1906. The total interest of these beneficiaries was divided into 1,500,000 equal shares, each beneficiary receiving the number of shares and a certificate

therefor equal to the number of shares of Great Northern stock he owned on December 6, 1906.[3]

The trust is to continue during the lives of 18 specified persons plus an additional 20 years after the death of the last survivor, unless sooner terminated. The trust instrument directs that upon the expiration of the 20 years following the death of the last survivors the trustees are to wind up the affairs of the trust, to pay all trust obligations, and then (a) to distribute all remaining moneys to the certificate holders and (b) to convey back to Lake Superior, or its successors or assigns, all remaining property other than money. In 1913 Lake Superior transferred to Great Northern whatever interest Lake Superior had in the trust. Through merger in 1970, Burlington Northern, Inc., has acquired whatever interest Great Northern as successor of Lake Superior had in the trust. The district court found that the purpose of the trust had been accomplished; that the trust should be terminated; and that Burlington Northern had no real interest in the trust. The court instructed the trustees that all property, both money and otherwise, should eventually be transferred to the certificate holders. In making the stated findings, the court first concluded that the trust instrument was ambiguous. It accordingly admitted and considered extrinsic evidence consisting of hundreds of pages of documents. We hold that the trust instrument is not ambiguous and that the district court's findings were clearly erroneous.

The scope of our review, as stated in Rule 52.01, Rules of Civil Procedure, is limited to the extent that findings of fact made by a district court should not be set aside unless clearly erroneous, due regard being given to the

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3. These certificates of interest in the trust are now traded on the New York Stock Exchange.

opportunity of the trial court to judge the credibility of the witnesses. This rule establishes a broader scope of review than that applied to the findings of a jury or an administrative tribunal, for as we said in *In re Estate of Balafas*, 293 Minn. 94, 96, 198 N.W.2d 260, 261 (1972), the trial court's findings may be held clearly erroneous, notwithstanding evidence to support such findings, if the reviewing court is left with the definite and firm conviction that a mistake has been made.

The capacity of a reviewing court to independently judge the meaning and effect of documentary evidence has never been clearly articulated by this court. Where, as in this case, the critical evidence is documentary, there is no necessity to defer to the trial court's assessment of the meaning and credibility of that evidence. We have in some cases deferred to the trial court's findings upon such evidence. *The Telex Corp. v. Data Products Corp.*, 271 Minn. 288, 292, 135 N.W.2d 681, 685 (1965); *Independent School Dist. No. 877 v. Loberg Plumbing & Heating Co.*, 266 Minn. 426, 435, 123 N.W.2d 793, 799 (1963); *Sommers v. City of St. Paul*, 183 Minn. 545, 551, 237 N.W. 427, 430 (1931). In our later cases, however, we have not done so. *Midway Center Associates v. Midway Center, Inc.*, Minn., 237 N.W.2d 76 (1975). See, also, *Northwestern Nat. Bank v. Simons*, Minn., 242 N.W.2d 78; filed herewith; *Metro Office Parks Co. v. Control Data Corp.*, 295 Minn. 348, 205 N.W.2d 121 (1973); *Town & Country Shopping Center v. Swenson Furniture Co.*, 261 Minn. 100, 104, 110 N.W.2d 525, 528 (1961). We think that the better rule is that articulated by Judge Jerome Frank in *Orvis v. Higgins*, 180 F.2d 537, 539 (2 Cir. 1950):

> "* * * Where a trial judge sits without a jury, the rule varies with the character of the evidence:

> (a) If he decides a fact issue on written evidence alone, we are as able as he to determine credibility, and so we may disregard his finding. (b) Where the evidence is partly oral and the balance is written or deals with undisputed facts, then we may ignore the trial judge's finding and substitute our own, (1) if the written evidence or some undisputed fact renders the credibility of the oral testimony extremely doubtful, or (2) if the trial judge's finding must rest exclusively on the written evidence or the undisputed facts, so that his evaluation of credibility has no significance. (c) But where the evidence supporting his findings as to any fact issue is entirely oral testimony, we may disturb that finding only in the most unusual circumstances."

Except as the scope of our review may be deemed broader under the rule of *In re Estate of Balafas, supra*, we adopt and approve this articulation.

The first matter the district court ruled on was the duration of the trust. One paragraph of the trust is a uses and trusts clause which provides that the trust shall continue for the lives of 18 named persons plus an additional 20 years, unless sooner determined.[4] A later paragraph provides that upon the expiration of the 20 years following the death of the last survivor of the 18 named persons the trustees shall proceed to wind up the affairs

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4. The trust instrument is in the form of a conveyance of real property. Following the habendum clause, the uses and trusts clause provides as follows: "IN TRUST, HOWEVER, to hold, use and dispose of the said property and all income and proceeds thereof, upon the trust herein expressed, for and during the lives of the following named persons and the life of the last survivor of them, and for and during the twenty (20) years next following the death of such last survivor, unless said trust shall be sooner determined, the names and description of said persons upon whose lives the duration of said trust is limited, being * * *."

of the trust.[5] The district court found, based on these two paragraphs, that the intended duration of the trust is ambiguous and that it is impossible to determine from the face of the trust instrument when the trust should terminate. It found, by resort to extrinsic evidence, that the intent of the settlor was that the trust be terminated before the stated term of 18 lives plus 20 years.

The trust instrument, however, is not ambiguous. The clearly stated intent of the grantor was that the trust continue for the lives of 18 persons plus 20 years, unless for some reason it might be "sooner determined." A provision with respect to "sooner" termination is not uncommon. While it recognizes the possibility of an earlier termination, it does not evince an intent that termination should come before the stated period. Situations which could cause termination sooner include, for example, failure of subject matter, termination by mutual consent of all concerned, and termination by legislative action amending the statutes which regulate trusts. While it is true any one of these situations conceivably could occur before the end of the stated term of 18 lives plus 20 years, and while it is true we cannot therefore ascertain with certainty the time when the trust will in fact be determined, the intent of the settlor is clear. Extrinsic evidence, therefore, may not be permitted to vary the plain meaning expressed in the trust instrument.

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5. Paragraph 17 of the trust instrument reads: "Upon the expiration of the twenty (20) years next following the death of the last survivor of the before mentioned persons upon whose lives the said trust is limited, the trustees shall at once proceed to wind up the affairs of said trust. After paying or providing for all expenses or obligations of the trust they shall distribute ratably among the certificate holders all moneys remaining in their hands as such trustees, and shall convey and transfer unto the party of the first part, or its successors or assigns, all property, save said moneys, held by them under said trust.

"And thereupon said trust shall cease."

Even were the extrinsic evidence upon which the court relied to be considered, it does not, taken as a whole, establish that the settlor's intent was that the trust should be terminated sooner than the expressly stated term of 18 lives plus 20 years. The district court in effect reformed the written trust instrument because of its finding that the settlor intended the trust to terminate upon the mining out of the "natural" ores. Express provisions of a trust instrument may be reformed if it clearly appears that the settlor was mistaken as to the provisions contained in the instrument it executed. The evidence does not demonstrate such a mistake, however. It indicates at most that the settlor may have been mistaken as to how long the trust properties would continue to be of significant value. Although the natural ores have been exhausted, the properties contain enormously valuable resources of taconite. The record does not show that the settlor, had it fully appreciated the true value of these mineral lands, would have drawn the trust to terminate sooner than the stated term of 18 lives plus 20 years.

The second matter which the district court determined was that Burlington Northern has no interest in the trust. The trust instrument provides that the trustees shall have full power to sell the trust property, exchange it for other property, or otherwise dispose of all or part of it.[6] An-

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6. Paragraph 9 of the trust instrument reads: "The trustees shall have full power, during the continuance of this trust, to sell at public or private sale, or exchange for other property, or otherwise dispose of all or any part of the shares of stock hereby transferred to them, or any other property that may have become subject to this trust; and to invest the proceeds of any such sale or sales in other property; and in case of such re-investment the property so acquired, as well as all property acquired by the trustees in exchange, or otherwise, for property held by them under this trust, shall be held by the trustees under the same trust and with the same powers and duties in respect thereto as are hereby provided in respect to the property herein described and conveyed."

other paragraph provides that at the termination of the trust all properties other than money shall be turned over to Lake Superior (the party of the first part), or its successors or assigns (now Burlington Northern).[7] The district court found an inherent ambiguity in these two provisions and again resorted to extrinsic evidence to determine the intent of the settlor. We find no ambiguity in these provisions.

Even if the extrinsic evidence were considered, however, we are not persuaded that the intent of the settlor was other than what was expressed in and incorporated by the trust.[8] The trustees may be given a power of sale over the property, but they are also instructed to turn over to the settlor or its successor whatever property they do not so choose to liquidate. There is no inconsistency in such a power and instruction.

The district court reasoned that no reversion in Lake Superior was intended because such reversion would have caused Great Northern to violate the law and its charter when it engaged in carrying ore mined from the trust properties. The court specifically had in mind the Hepburn Act, the Interstate Commerce Act, and "the tenor of the United States Supreme Court cases covering such matters."

The Commodities Clause of the Hepburn Act, now 49 U.S.C.A., § 1(8), upon which the court particularly focused, prohibits a railroad from carrying ore mined or

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7. See footnote 5, *supra*.

8. Burlington Northern contends that the settlor intended that the trustees be restricted in their powers not only by the provisions on the face of the trust instrument, but also by certain rules of the common law, which rules were incorporated into the trust by implication. We express no opinion on what rules of common law might have been intended to be incorporated into the trust, for these contentions may be addressed to the trial court upon remand.

produced by it or under its authority or in which it may have any interest, direct or indirect. It is not clear that immediately after the creation of the trust in 1906 Great Northern's carriage of ore mined from the trust properties would have violated the Hepburn Act, for it is not clear that it would have been deemed to have any interest in the ore. It was not until 1913 that the railroad acquired Lake Superior's interest in the trust, and we are not prepared to say that this transfer 7 years later is controlling in ascertaining the intent of the grantor when this trust was drawn. Even if the carriage of the ore were held to be illegal, moreover, it does not follow that this alone would render invalid what is an otherwise valid provision in this trust.

The district court found that if there was to be a reversion of the properties to Lake Superior, it was intended to be no more than a receptacle for worthless properties. From this the court concluded that no reversion was intended at all. Even had the settlor assumed in 1906 that all it should ever expect to receive back was title to virtually worthless, mined-out properties, it did direct that the properties be returned, without regard to what their value might in fact be at the termination of the trust. If these properties have become unexpectedly more valuable today because of improved mining technology, this fact does not change the settlor's expressed intent that the properties be returned when the trust is terminated.

Finally, the district court concluded that any property the trustees returned to Lake Superior or its successor at the termination of the trust would, because of the contract of October 20, 1899, and certain informal communications made by James J. Hill, be held in perpetual trust

for the benefit of the shareholders of Great Northern as they appeared on December 6, 1906, or their successors in interest. The court found that the successors in interest of these shareholders are the certificate holders and that they for all intents and purposes hold a fee interest in the trust properties. We disagree.

It is clear that the contract of October 20, 1899, referred to earlier in this opinion, established Lake Superior as the instrumentality of Great Northern. Lake Superior agreed, in consideration of the transfer of property to it, that it would hold and dispose of said property in whatever manner Great Northern might direct. At that time Lake Superior held the property for the benefit of Great Northern, not for the benefit of Great Northern shareholders per se. Great Northern thereafter directed Lake Superior to dispose of the property by conveying it into a trust, the beneficial interest in which was to be given to the shareholders of Great Northern as they appeared of record on December 6, 1906. We agree that following receipt of this direction Lake Superior could have been said to hold the property for the benefit of the shareholders, in that it was obligated to convey to a trust for the benefit of the shareholders. Indeed, the recitation of the trust instrument executed on December 7, 1906, states that Lake Superior holds the property "for the benefit of the shareholders of The Great Northern Railway Company."[9]

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9. This recitation could alternatively have arisen from an imprecise usage of language. Under the terms of the contract of 1899, Lake Superior held the property for the benefit of Great Northern, but Great Northern's interest was in turn held for the benefit of its shareholders. Thus it may be said that, in a manner of speaking, Lake Superior held the property for the benefit of the shareholders even before Great Northern directed that the trust be executed.

It does not follow, however, that any property the trustees are to return to Lake Superior or its successor in the future will be held for the benefit of the shareholders per se or their successors. Under the contract of 1899 such property would, contrary to the district court's conclusion, be held for the benefit of Great Northern or its successor. In 1913 Great Northern succeeded to Lake Superior's interest in the trust, and Burlington Northern has since succeeded to Great Northern's. Any property returned to Burlington Northern by the trustees would therefore be held only for Burlington Northern's own benefit. The district court's decision, accordingly, must be reversed.

Because it concluded that Burlington Northern had no interest in the trust, the district court did not consider the issues which the trustees sought to resolve by these proceedings—namely, the extent of the trustees' authority to convert trust assets into cash and, if they have such authority, what their duties are with respect to the exercise of that authority. We better fulfill our function as a reviewing court when we review issues after they have been decided below, rather than deciding them ourselves in the first instance. Therefore, we reverse and remand for further proceedings not inconsistent with this opinion.

Reversed and remanded.

Otis, *J.*, took no part in the consideration or decision of this case.

ORDER ON REHEARING

(July 19, 1976)

STATE OF MINNESOTA
OFFICE OF CLERK OF SUPREME COURT
ST. PAUL, MINN.

In re Trust Known as Great Northern
Iron Ore Properties.

Supreme Court Nos. 44775 and 44776

SIR:

You will please take notice that on this date the following order was entered in the above entitled cause:

ORDERED, that the petition for reargument herein be and the same hereby is denied and stay vacated.

Yours respectfully,

JOHN MCCARTHY
Clerk Supreme Court

OPINION OF THE TRIAL COURT

(On the First Review)

(November 6, 1973)

File No. 386008

DISTRICT COURT
SECOND JUDICIAL DISTRICT

STATE OF MINNESOTA
COUNTY OF RAMSEY

IN THE MATTER OF THE TRUST KNOWN AS
GREAT NORTHERN IRON ORE PROPERTIES

ORDER AND MEMORANDUM

The above matter came on before the undersigned on December 11, 1972, April 20, 1973, June 18, 1973, and July 6, 1973, pursuant to a Petition by the Trustees for confirmation of their appointment as trustees, approval of their filed accounts, and for instructions. The matter of confirmation and approval of the accounts having been previously determined, those matters are no longer before the Court. The Trustees appeared by their counsel, Frank Claybourne and Jack C. Foote; Burlington Northern appeared by its counsel, Richard V. Wicka, Kurt W. Kroschel, Frank S. Farrell, Reginald Ames, and James W. Becker; Petitioners Charles S. Arms and Elizabeth P. Arms appeared by their counsel Thomas V. Koykka, Keith Benson, David Coleman, James R. Oppenheimer, and John H. Wolf; and Margot Siegel, one of the Certificate Holders in the Trust, appeared by Harold Siegel, her attorney. At the various hearings testimony was taken and documentary evidence introduced, and all counsel have supplied the

Court with extensive briefs, and the Court now being duly advised in the premises makes the following order:

IT IS ORDERED that the Trust under the agreement of December 7, 1906, between Lake Superior Company, Limited, and Louis W. Hill, James N. Hill, Walter J. Hill, and Edward T. Nichols, commonly known as the Great Northern Iron Ore Properties Trust, shall be terminated in accordance with the attached Memorandum.

IT IS FURTHER ORDERED that this Court's Order of December 20, 1972, requiring the publication of any future notices or orders is hereby suspended, and this Order shall be disseminated by mailing a copy of it to each of the certificate holders at his or her last known address as soon as practicable following receipt thereof by counsel for the Trustees.

The Memorandum attached hereto is made a part of this Order.

Dated: November 6th, 1973.

HYAM SEGELL
Judge of District Court

MEMORANDUM AND INSTRUCTIONS

This matter came before the Court pursuant to a Petition of the four Trustees of the Great Northern Iron Ore Properties Trust [hereinafter sometimes referred to as the Trust in Issue] for confirmation of their appointment and for instructions. The confirmation of the Trustees having been resolved in a separate proceeding, that matter is no longer before the Court. Charles S. Arms and Elizabeth P. Arms who are certificate holders of the Trust in Issue are parties to this proceeding, and they are hereafter generally referred to as Arms or Arms Petitioners. Burlington Northern, Inc., is a party to this proceeding

as a successor to the Great Northern Railway Company and is hereafter generally referred to as Burlington Northern. Great Northern Railway Company is hereafter referred to as the Great Northern. In order to ascertain whether the requested instructions should be given on the basis of the precise language of the Trust Instrument or on the basis of its language plus other extrinsic evidence, including parol evidence, the Court was first required to make a determination whether the Trust Instrument was ambiguous. In this connection, our Supreme Court has said:

> "Although under the parol evidence rule [in the absence of fraud or other ground for reformation or revision], extrinsic evidence may not be used to contradict or vary the settlor's written declaration of intent, it is nevertheless admissible in interpreting and clarifying a writing which is ambiguous and uncertain as to the settlor's intended meaning. *Thus, for the purpose of resolving ambiguity, extrinsic facts and surrounding circumstances—inclusive of the conduct of the parties and any practical construction which they themselves have applied to the writing—may be considered in ascertaining the settlors' manifest intent.*" [Emphasis supplied] *In Re Declaration of Trust by Bush*, 249 Minn. 36, 42, 81 N.W.2d 615.

Moreover *In Re Moulton's Estate*, 233 Minn. 286, 46 N.W.2d 667, the Court said:

> "Not only the trust instrument itself, but the situation of the settlor and his manifest purpose in creating a trust, may be considered."

It is thus evident from these decisions that, if the Trust Instrument is ambiguous, the Court is entitled to consider extrinsic evidence in order to clarify the writing.

In their Petition for Instructions, at Paragraph 5, the Trustees stated as follows:

> ". . . Petitioners believe that they have the authority, to the extent practical, to convert all assets in their hands to cash as termination of the Trust becomes imminent, and to distribute the proceeds of such conversion, together with any other cash on hand at the termination of the Trust to the then holders of Certificates of Beneficial Interest."

Some months after their original Petition was filed, the Trustees moved to amend and did amend their Petition so as to change the quoted portion above to read as follows:

> ". . . Petitioners ask whether or not they have the authority to convert all assets in their hands to cash as termination of the Trust becomes imminent, to the extent practicable. If the Court finds they have, then they wish to be instructed as to whether they have the duty so to convert."

Implicit in the foregoing language quoted from the Trustees' Petition and its amendment is the fact that the Trustees, as well as their lawyers, who are extremely competent, felt that the original Trust Instrument had certain ambiguities in it, or, at the very least, that its meaning might be in doubt. [*Mason's Dunnell Minnesota Digest*, Volume 19B, Section 9893 (5)] It is difficult to understand why the Trustees now deny that the Trust Instrument is in any way ambiguous [see Memorandum of Trustees on Order to be Made, p. 3], since they plainly acknowledge this ambiguity in their original and amended Petition.

As the Arms Petitioners point out, the Trust Agreement is "less than crystal clear." Not only is the document, itself, patently ambiguous in this Court's view, but its

ambiguities have been enhanced by a very substantial change in circumstances occurring since the inception of the Trust. The most dramatic ambiguity lies in the problem presented in reading Paragraph 17 in conjunction with the language contained in Paragraphs 2, 3, and 4, as is pointed out in the Arms Petitioners Brief at page 46. This is the problem that is presented by authorizing, on the one hand, in Paragraphs 2, 3, and 4, the disposition by sale or otherwise of all assets, both income and corpus, contained in the Trust during the lifetime of the Trust and, in Paragraph 17, suggesting that there be a remainder upon termination of the Trust.

Having thus made the threshold decision that the Trust was patently ambiguous, and having in mind the case law which admits of extrinsic evidence in such cases, the Court admitted literally hundreds of exhibits offered by all parties; from these documents a pertinent history emerges, which has been fairly useful in resolving the ambiguities inherent in the Trust Instrument.

I. BACKGROUND COMMENTARY

A. ACQUISITION OF ORE PROPERTIES.

The history of the Trust is inextricably intertwined with the history of the Mesabi Range. The first large scale iron ore strike occurred on the Mesabi Range in 1889-1890 [Arms Exhibit 89, p. 366], and the iron ore properties that went into the Trust in Issue were acquired between 1897 and 1906. Some of these properties were acquired as a consequence of the Great Northern Railway Company and its subsidiaries, such as the Eastern Railway Company of Minnesota [Hereafter Great Northern Railway Company will be referred to as Great Northern] acquiring additional railroad property. As an example,

the acquisition of the Duluth and Winnipeg Railway, which would have connected the Eastern Railway's lines at Duluth with those at Crookston [Arms Exhibit 1, p. 3152; Arms Exhibit 61, p. 215], required that certain other companies, such as the North Star Construction Company which served the railway and the North Star's land holding company, the North Star Iron Company of West Virginia, be acquired at the same time. While the presence of iron ore was suspected, the North Star Iron Company considered that its land holdings were essentially timberland, consisting of approximately 12 to 18,000 acres [Arms Exhibit 1, pp. 3152-3153]. Similarly, James J. Hill, the President of Great Northern, in conjunction with his acquisition of the Duluth, Mississippi River and Northern Railway Company, was compelled to purchase approximately 25,000 acres on the Mesabi Range known as the Wright-Davis lands; this acquisition was completed on January 27, 1899, with Hill acquiring the Wright-Davis lands in his own name for approximately $4,000,000.00. Since these acquisitions bear on subsequent issues of purpose and intent, the details of them are of sufficient importance to relate in full at this juncture. James J. Hill testified in Congressional hearings under oath as follows:

"The Chairman. What properties had you acquired, Mr. Hill, on the Mesabi Range?

Mr. Hill. The first was some property that came with a bankrupt railway that was started to be built from Lake Superior west.

The Chairman. What railway?

Mr. Hill. I think it was called the Duluth & Winnipeg and it became bankrupt." [Arms Exhibit 1, p. 3152]

He explained further:

"The Chairman. What relation was there between this railroad and this body of ore lands? How did they happen to throw in the ore lands with a railroad that did not touch the ore lands?

Mr. Hill. The parties who were instrumental in promoting the railway were interested or had in connection with it a lot of lands on the Mesabi Range called the North Star Iron Co. In the purchase of that Duluth & Winnipeg Railway the North Star Co.'s lands came with it—that is, something like 90 per cent of the stock of the company. This North Star Co. was an incorporated company.

The Chairman. And had lands on the Mesabi Range?

Mr. Hill. Yes, sir.

The Chairman. What was the extent of their holdings?

Mr. Hill. I could not say: about ten or twelve thousand acres.

The Chairman. At what time was this?

Mr. Hill. I think we got that property about 1896 or 1897." [Arms Exhibit 1, p. 3153]

Turning then to the Wright-Davis purchase, James J. Hill testified:

"Mr. Hill. I think I can make it a little plainer, by stating the way that we came to own that ore, just how we got it.

There was a railway belonging to Wright & Davis, Michigan lumbermen, which connected with the Du-

luth & Winnipeg. They owned somewhere in the neighborhood of 25,000 acres of land that was particularly well situated on the range.

One mine—possibly more than one, but one mine—opened on their land, and was a large shipper. That ore came down over the lumbermen's road to a connection with the road that we bought and finished through to the Red River Valley.

My son was in charge of the Eastern Minnesota, which was a subsidiary line owned by the Great Northern. He was very anxious that I should come up and look the ground over. He attached a great deal of importance to the transportation of the ore. He had met Mr. Wright and had an understanding with him that if they sold they would give us an opportunity to purchase it.

The Chairman. Who do you mean by 'us,' Mr. Hill?

Mr. Hill. Well, myself. I had never been up on the range. I went up and I saw this Mahoning mine. It is the largest mine probably on the range.

I told him to take it up with Messrs. Wright & Davis at any time he was ready and to see what he could do.

Shortly after, he got a communication from them that they were about to dispose of it to the Consolidated Co.

Mr. Young. The Consolidated Mines Co.?

Mr. Hill. Yes, sir; and afterwards known as the Rockefeller Co. Of course, if they bought it they would transport it over their own railway. There

was very little business on that road for the first 160 miles outside of the ore.

Within a short time, by appointment, I met Wright and Davis in Chicago. Mr. Wright was quite an old man, and he was anxious to close out his entire interests in the Mesabi, the railroad and the ore lands. He also had some uncut pine. This was originally pine land. They bought it for that purpose.

Some of it they had disposed of and agreed to cut and deliver the logs to the Mississippi River at Swans River. He wanted me to purchase the whole outfit, including his contract. His contract was with Mr. Warehouser, or the Warehouser Co. Mr. Warehouser expressed his willingness that if I assumed the contract he would consent to the transfer.

In that way I bought the Wright & Davis property, about 25,000 acres." [Arms Exhibit 1, pp. 3155-3156]

B. SOURCE OF CONSIDERATION PAID FOR ORE PROPERTIES.

As to payment for the lands in question, James J. Hill further testified in the Congressional hearings that he had personally acquired these iron ore properties.

"The Chairman. What properties had you acquired, Mr. Hill, on the Mesabi Range?

Mr. Hill. The first was some property that came with a bankrupt railway that was started to be built from Lake Superior west [i.e., property owned by North Star Iron Company.]" [Arms Exhibit 1, p. 3152; see also Arms Exhibit 61, Pyle, p. 215]

He also testified under oath before the Knutson Committee of the Minnesota Legislature on February 14, 1907. [Arms Exhibit 7]

"Q. Now, you purchased those lands from the Wright & Davis Company, did you?

A. Yes sir.

Q. You purchased them personally?

A. Yes sir.

Q. Out of your own funds?

A. I raised the money to do so.

Q. Pledged your own credit?

A. Yes sir.

Q. Was the credit of the Great Northern Railway Company at all pledged to the payment of them?

A. The Great Northern Railway Company had nothing to do with it.

Q. Any of the securities of the Great Northern Railway besides your own personal ones?

A. Not a dollar.

Q. The Great Northern Railway Company had absolutely nothing to do with the securing of those lands?

A. No sir.

Q. Now, it was a matter entirely personal with you?

A. In so far as the Great Northern Railway Company is concerned, they had no more to do with it than you had." [Arms Exhibit 7, pp. 15-16]

* * * * *

"Q. Was the credit of the Great Northern Railway Company pledged to its payment?

A. Not in any way or manner.

Q. Was the credit of the Eastern Railway Company of Minnesota pledged to its payment?

A. Not in any manner.

Q. Any one besides yourself?

A. No sir.

Q. As endorser?

A. No sir.

Q. As guarantor?

A. No sir.

Q. That was an entirely personal deal?

A. Personal matter." [Arms Exhibit 7, p. 22]

* * * * *

"The Chairman. What did you pay Wright & Davis for this property?

Mr. Hill. $4,050,000.

The Chairman. It became your property?

Mr. Hill. Yes sir.

The Chairman. You gave them a check for that property, I presume you did not pay them in cash?

Mr. Hill. I paid them, I think, $1,000,000.

The Chairman. Did you not give them a check for that property on the Chase National Bank?

Mr. Hill. I gave them, I think, $1,000,000 and then I paid them a further amount; and a portion of it was left until they were in a position to deliver it to us.

The Chairman. But was not that property paid for by check to Wright & Davis, drawn on the Chase National Bank, of New York?

Mr. Hill. I think $1,000,000 was paid in check on the Chase National Bank, and possibly the later payments, because I did my banking business with them." [Arms Exhibit 1, p. 3160]

* * * * *

"The Chairman. Was not that money taken—was not the payment of that check—taken out of the funds or out of the surplus of the Great Northern Railroad?

Mr. Hill. Not a penny of it.

The Chairman. Did you make a statement of that kind before the Miller Committee?

Mr. Hill. Of what kind?

The Chairman. A statement to the effect that a part of this money in some way came out of the Great Northern Railroad.

Mr. Hill. It did not; not a penny of it.

Mr. Young. What is the Miller Committee?

The Chairman. The Minnesota committee which investigated into this situation.

Mr. Hill. Before that committee I testified clearly that the Great Northern never paid a dollar.

The Chairman. The Great Northern or none of the Great Northern Funds, then?

Mr. Hill. None of the Great Northern funds were paid to Wright & Davis; not a cent.

The Chairman. It was all your own personal property?

Mr. Hill. Yes, sir." [Arms Exhibit 1, p. 3161]

Following the acquisition of the approximately 12,000 acres owned by North Star Iron Company and the approximately 25,000 acres owned by the Wright-Davis people, additional iron ore land was acquired largely by Louis W. Hill, the son of James J. Hill, to make up a total of approximately 65,000 acres of ore lands over which the Hills had complete or fractional control.

C. LAKE SUPERIOR COMPANY AS A PREDECESSOR TRUST.

On July 25, 1899, James J. Hill, James N. Hill, his son, and Robert I. Farrington, who was the Comptroller of the Great Northern and one of its vice-presidents and directors, formed the Lake Superior Company, Limited, a limited partnership under the laws of Michigan, ostensibly for the purpose of dealing and working in mineral lands in the State of Minnesota, among others, mining iron ore and marketing it, and leasing lands and mines for royalties. The Lake Superior Company was thereafter used as a holding company or as a trust vehicle to hold these various ore properties comprising some 65,000 acres, that had been acquired by the Hills, for the benefit of the stockholders of the Great Northern. James J. Hill made this abundantly clear in his testimony before the Congressional committee:

"Mr. Gardner. I understand the witness owned certain stocks in the Wright & Davis Co. and other pieces of property which he transferred to the Lake Superior Co. (Ltd.) under deed of trust for the benefit of stockholders of record of the Great Northern Railroad securities; is that right?

Mr. Hill. For the benefit of the stockholders of the Great Northern Railway Co.

Mr. Gardner. The Great Northern Railroad Co.?

Mr. Hill. Yes.

Mr. Gardner. What was the consideration for that? I mean, you and your associates owned this property and apparently you turned it over to a holding company?

Mr. Hill. There was no associates. I bought it and paid for it, and the property was handled and I was paid back, I think, the cost price and interest

at 5 per cent during the time my money was invested in it.

Mr. Gardner. That is to say the Lake Superior Co. paid you for these pieces of property?

Mr. Hill. Yes.

Mr. Gardner. And, in return, the stockholders of the Great Northern Co. paid the Lake Superior Co., did they?

Mr. Hill. The Lake Superior Co. had considerable income. They started right in to have considerable income from the mines.

Mr. Gardner. What I could not understand in the course of the question was the means by which these properties ceased to be operated and owned in your interest and became operated and owned in the interest of the stockholders of the Great Northern Railway Co.

Mr. Hill. They were never operated—

Mr. Gardner. Leave out the word 'operated,' then, and say 'owned' in your interest.

Mr. Hill. They were owned.

Mr. Gardner. You owned them?

Mr. Hill. Yes.

Mr. Gardner. You put them in a holding company, to wit, the Lake Superior Co. (Ltd.)?

Mr. Hill. Yes.

Mr. Gardner. Ordinarily people would say that the holding company would hold them for your benefit, instead of which they hold them for the benefit of the stockholders of the Great Northern Railway Co.

Mr. Hill. That is right.

Mr. Gardner. I ask what was the consideration, and why was that done?

Mr. Hill. What was the consideration?

Mr. Gardner. Yes.

Mr. Hill. The consideration was the amount that I had paid with 5 per cent interest during the time that my money was invested.

Mr. Gardner. Was that paid back to you?

Mr. Hill. Yes." [Arms Exhibit 1, pp. 3167-3168]

* * * * *

"Mr. Beall. It seemed to me that the right thing was for them to have refunded to you the amount of money you had paid—

Mr. Hill. So long as I got my money, with interest, what difference did it make?

Mr. Beall. Of course you had no basis for complaint, but I can not see what interest these—

Mr. Hill (interposing). But I represented these stockholders. I was, in a measure, dealing with myself.

Mr. Gardner. Let me put it this way: You pay $4,000,000, really acting for the stockholders of the Great Northern Railway Co.?

Mr. Hill. I bought that property so as to get control of the transportation of that ore, which was important to that portion of the road, which had practically no business.

Mr. Gardner. You did it with their interest in view—not with your own interest in view?

Mr. Hill. That is right.

Mr. Gardner. Subsequent events showed the property was worth a good deal more than $4,000,000?

Mr. Hill. Yes.

Mr. Gardner. You are paid back your $4,000,000, and, really, the whole thing has been done for the stockholders?

Mr. Hill. Yes.

Mr. Gardner. They get the balance, whatever it is worth, over that $4,000,000?

Mr. Hill. Yes.

Mr. Gardner. But supposing the thing had gone the other way; supposing, instead of being worth $4,000,000, it had proved to be worth only $2,000,000, how would you have been protected?

Mr. Hill. I should have been out. I was under no obligation to buy it from them." [Arms Exhibit 1, p. 3171]

The foregoing testimony relates primarily to the acquisition of the Wright-Davis lands. Omitting these and the North Star Iron Company lands, almost all of the additional lands that were subsequently to make up the properties put into the Great Northern Iron Ore Properties Trust were gradually acquired by Louis W. Hill after the execution of a contract between Great Northern and Lake Superior Company dated October 20th, 1899. [Arms Exhibit 5] In many of the cases Hill would file a declaration of trust in connection with properties which he had acquired, and the properties would later be transferred for value to Lake Superior Company, Limited. [See p. 3, Arms Exhibit 5]

A good summary of these transactions is found in the Congressional hearings in the sworn testimony of James J. Hill.

"Mr. Gardner. The witness had shown that stocks in various concerns which he owned and extraneous pieces of property were transferred to the Lake Superior Co. (Ltd.).

Mr. Hill. In trust.

Mr. Gardner. In trust; and that the beneficiaries of the trust, instead of being himself, were the stockholders of the Great Northern Railway Co."

* * *

"Mr. Gardner. . . . That puts the trustees, after they pay you back in the position of being a holding company for new parties?

Mr. Hill. Yes.

Mr. Gardner. *And the new parties are the Great Northern Railway Co.?*

Mr. Hill. *No, sir; the stockholders of the Great Northern Railway Co.*

Mr. Gardner. Did the stockholders pro rata pay into the Lake Superior Co. (Ltd.) the amount which they paid you?

Mr. Hill. No.

Mr. Gardner. How did they acquire their interest?

Mr. Hill. How did they? It was given to them.

Mr. Gardner. Where did the Lake Superior Co. get its funds to pay you?

Mr. Hill. The Lake Superior Co. carried on the business and received the income from royalties and one source and another. I think they sold the elevator. I am speaking from recollection now. I do not carry these transactions. I think, however, they sold the elevator and they may have used that fund.

Mr. Gardner. Let me see if I have the transaction right: You purchased certain shares in the Wright & Davis Co. and certain other parcels of property, and you transferred them to the Lake Superior Co. (Ltd.) under a deed of trust for the benefit of the stockholders of the Great Northern Railway Co.

In time they realize on some of these properties, derive an income on others, and from the funds received from those profits and those sales of property, like the elevator company, they pay you back, and the stockholders of the Great Northern Railway Co.

at once become the proprietors of so much of the property as is left after paying you back. Is that correct?

Mr. Hill. They are the beneficiaries, not the proprietors.

Mr. Gardner. That is, they become the sole beneficiaries of this property held in trust for them?

Mr. Hill. That is as I understand it.

Mr. Gardner. In other words, it cost the stockholders of the Great Northern Railway Co. nothing?

Mr. Hill. Nothing.

Mr. Gardner. You were paid back for what you expended and, ultimately, the Great Northern Railway Co. stockholders get the benefit of that which the property actually proved to be worth over and above what you paid for it?

Mr. Hill. Yes, sir.

Mr. Gardner. Is that a correct statement?

Mr. Hill. That is the transaction. That is it exactly." [United States Steel Corporation Hearings, Arms Exhibit 1] [Emphasis supplied]

Thus, whether the properties were transferred by deed of trust, as was indicated in some of the foregoing testimony of James J. Hill, or whether they were transferred in consideration of the repayment to Hill of the monies that he had, in fact, personally paid for these properties, it is quite plain that by transferring the ore properties to Lake Superior Company, Limited, Hill clearly intended to create a trust in favor of the stockholders of the Great Northern rather than a trust in favor of the railway corporation, itself; while there is a suggestion in the contract dated October 20th, 1899, executed by the Great Northern and Lake Superior Company, Limited, that the ore

properties were transferred to Lake Superior Company at that time, it is quite likely, based upon the sworn testimony of Hill, that the ore properties were transferred to Lake Superior Company before and after that date; however, regardless of when they were transferred, it is quite clear that, at the very least, an implied if not an express trust was created by Hill in favor of the stockholders of the railway, of which he was president, by the transfers. That the Lake Superior Company was such an implied or express trust for the benefit of the Great Northern shareholders is further borne out in James J. Hill's testimony before the Knutson Committee:

> "I think that it was an arrangement made for the purpose of carrying these lands in trust for the benefit of the shareholders." [Arms Exhibit 7]

And in a letter which he wrote to Mr. Gardner M. Lane on August 26, 1905, before the creation of the Trust in Issue, he said:

> "The iron ore properties are held in trust for the benefit of the Great Northern shareholders . . ." [Arms Exhibit 24d]

It is interesting to note that Burlington Northern in its brief concedes the trust nature of the holdings of Lake Superior Company prior to the creation of the Trust in Issue. In its brief, at page 90, the writer states:

> ". . . the interest of the stockholders of Great Northern Railway Company and the properties trusteed with the Lake Superior Company, Limited, was identical to the interest of Great Northern Railway Company stockholders in the properties trusteed with the Great Northern Iron Ore Properties Trust . . ."

And at page 91 of its brief, the writer also says:

> "It is also evident that the Lake Superior Company, Limited, was considered a trust for the benefit of the stockholders of the railroad."

In a letter that James J. Hill wrote to J. F. Baker on January 19, 1906, before the inception of the Trust in Issue, Hill referred to the property that was "trusteed." [Arms Exhibit 24e]

It is thus clear that all parties to this proceeding, as well as all of the parties who were initially involved in the acquisition and disposition of these ore lands, had in mind that the lands would be held at all times for the benefit of the shareholders of the Great Northern.

D. THE CONTRACT OF OCTOBER 20, 1899.

On October 20, 1899, a contract was entered into between the Great Northern and the Lake Superior Company. [Arms Exhibit 12] As a preamble to that agreement, it is stated at Paragraph 1 that certain stocks, bonds, and properties have been transferred to the Lake Superior Company. Included among these are the lands embraced by the acquisition by James J. Hill of the Wright-Davis properties and the lands embraced by his acquisition of the North Star Iron Company. None of these lands, as was demonstrated previously, were owned by the Great Northern, nor did that company advance any of the consideration for their purchase so far as is known from the sworn testimony of James J. Hill. This fact does not necessarily mean that there was a failure of consideration in the contract of October 20th, 1899, but it does add to the somewhat obscure history that surrounds the acquisition and disposition of the ore properties. The contract further provides against the alienation of any of these

properties without the express consent of the Great Northern Railway; however, the important provision is that contained in Paragraph 3, in which the stockholders of the Great Northern are made the third-party beneficiaries of all of the income that is left from the Lake Superior Company's operations after the payment of all administrative expenses, et cetera. Thus, if there was any question about the express or implied trust in favor of the stockholders of the Great Northern Railway, it is certainly dispelled by the contract of October 20, 1899. [Arms Exhibit 12]

Carrying out the spirit and letter of the aforementioned Paragraph 3 in the contract, it is to be noted that during the period that the contract was in force, and prior to the execution of the Trust Agreement in issue, Lake Superior Company received in income from the Wright-Davis lands to June 30th, 1906, approximately one and three-quarter million dollars; of this amount it distributed to the stockholders of the Great Northern the sum of $493,413.50. [Arms Exhibit 16a] This exhibit also shows the acquisition of additional ore lands costing approximately one and a quarter million dollars, thus explaining the disposition of all of the income received.

What was understood by both the Great Northern directors and its stockholders regarding these various ore and other properties is of even greater significance. In separate resolutions ratifying the contract of October 20, 1899, by the stockholders of the Great Northern, and by its Board of Directors, the following language appears:

> "Whereas the stocks, bonds and properties transferred to the Superior Company by such contract were acquired with funds which might otherwise have been lawfully distributed in the form of dividends to and among the stockholders of the company, *and such*

stocks, bonds and properties have been held subject to the division among such stockholders through a sale and distribution of proceeds, or otherwise . . ." [Burlington Northern Exhibits 1 and 2] [Emphasis Supplied]

Such language clearly manifested an intent on the part of both the stockholders and directors, both of whom approved the resolution, to recognize the stockholders' *proprietary* interest in the iron ore and predecessor properties, as well as their beneficial interest in the income therefrom.

At this point it should be emphasized that from all of the evidence introduced by the parties, which has been carefully examined by the Court, there is no credible support for the idea that the Great Northern Railway Company ever owned or controlled any of the ore properties. While the contract of October 20, 1899 [Arms Exhibit 12], recited a purported transfer of the Wright-Davis lands and North Star Iron Company lands from Great Northern to Lake Superior Company [Arms Exhibit 12], all evidence conclusively points to the fact that these lands were owned individually by James J. Hill and his family, and that no part of the consideration used to acquire them was ever paid by the Great Northern. [Arms Exhibit 61, Exhibit 7, pp. 15-16, p. 22, Exhibit 1, pp. 3160-3161] The other properties that appear to have been transferred by the railways in that contract may well have been owned by the railway but were not in any sense iron ore properties. As a matter of fact, these other properties were sold by Lake Superior Company before the Trust in Issue was created, and the proceeds from such sales were either used to purchase some of the minor ore properties, or to repay James J. Hill. The bulk of the ore properties, however, were purchased individually by James J. Hill and his son, Louis, and thereafter transferred to Lake Superior Company. The

source and acquisition cost of all the ore properties is well illustrated in Arms Exhibit 5.

One other fact is worthy of emphasis. Neither in the sworn testimony of James J. Hill nor in any document was it ever suggested that the Great Northern should become a residuary beneficiary of the iron ore properties. All of the evidence points clearly to a termination of the trust at such time as the natural ore mining was completed. At no time during the past sixty-five years has the Great Northern Railway Company reflected on its books or in its records any dollar value or any other interest in the ore properties. [See Burlington Northern Response to Request for Admissions, No. 1aa, Tr. 418-419] Considering that it had no interest to start with and never claimed any interest during the past sixty-five years, it is interesting to observe that it now claims that it is entitled to millions of tons of beneficiated or taconite ores.

A few words should be devoted to what the Hills and subsequently Lake Superior Company acquired in terms of iron ore in these various purchases. The Wright-Davis lands, consisting of approximately 25,000 acres, contained the famous Mahoning Mine at Hibbing, which continued to operate as a natural ore mine until it closed in August, 1973. James J. Hill, in the period 1903 to 1908, repeatedly expressed his belief that there were about 500,000,000 tons of natural ore in the ore properties. [Arms Exhibit 1, pp. 32, 36, Arms Exhibit 7, pp. 83, 85, Arms Exhibits 43b, 24d, 24f, 24g, 24h, 24j, Burlington Northern Exhibits 17, 23, and 24] As the Arms Petitioners have pointed out in their brief, the Hill estimate of approximately 500,000,000 tons of ore turned out to have been "fantastically accurate." The Trustees' reports state that through the year 1972 a total of 457,605,775 tons of ore had been mined from the iron ore properties held by the Trust. [Arms Brief, p. 32]

It was estimated that there were approximatly 15,923,681 tons of natural ore remaining and that the "last major mining" would probably be concluded in about a year. [Arms Exhibit 64, p. 4]

As Burlington Northern points out in its brief, the estimates that Hill made covered only *natural ore* [Burlington Northern Brief, p. 110], and that specifically with an iron content of approximately 49 per cent or more. It is apparent that no one at that time thought in terms of any other kind of ore that might be located on the property, and, while there was an awareness that there were vast quantities of taconite existing on the ore properties, there was no thought by anyone at that time that such ore could become merchantable in the future. Taconite was considered to be country rock [see the Hill testimony in Arms Exhibit 1], and, of course, it was not a merchantable ore because the minimum merchantable ore at that time contained at least 49 per cent iron; in the early years of mining operations in that area the natural ores were averaging 60 per cent iron content; while we know from Dr. E. W. Davis that some efforts were made in the second decade of the twentieth century to prepare taconite for the smelter through a sintering process, these efforts were largely a failure. [Arms Exhibit 90] It was not until the process of pelletizing the ore was developed in the 1940s that any of the mining companies gave any thought to the feasibility of mining taconite. The Trustees of Great Northern Iron Ore Properties, themselves, saw no prospects in taconite until their reports in the late 1950s [see Arms Exhibit 65, Report for 1957], and, as a matter of fact, no taconite was removed from trust properties until 1967. It is abundantly clear, therefore, that the Trust in Issue contemplated the mining of natural ore only, and its duration was geared to that end.

E. THE TRUST IN ISSUE

On December 7th, 1906, the Trust Agreement in Issue was executed by the Lake Superior Company, Limited, as the settlor and Louis W. Hill, James N. Hill, Walter J. Hill, and Edward T. Nichols as Trustees. The first prefatory clause in that agreement is worth noting:

> "Whereas the party of the first part has acquired the shares of stock hereinafter described and transferred, and *now holds the same for the benefit of the shareholders of the Great Northern Railway Company;* . . ." [Emphasis Supplied] [Arms Exhibit 70-A]

There were two reasons for creating this trust; these will be discussed in some detail at a later point. The first was to assure the Great Northern that it would obtain the freight revenues from transporting the ore and, secondly, to assure that the stockholders of the Great Northern would receive the income from the ore lands so long as the then merchantable ore lasted; it should be noted in this connection that it was anticipated that the ore would last approximately fifty years [Arms Exhibit 3, Burlington Northern Exhibits 19 and 22]; and it was for this reason that the ostensible duration of the trust—and its duration is undoubtedly ambiguous—was to be measured by the lives of eighteen named persons, plus twenty years following the death of the last survivor of them. Some of these persons were as young as *three* years old at the time of the execution of the Trust. It was the intent to give sufficient duration, approximately 100 years, to the trust, it being fully anticipated that it would be terminated before that time. [Arms Exhibit 3] As a matter of fact, in the same paragraph, wherein it is stated that the Trust shall last for a period of twenty years next following the death of the last survivor, it is also stated immediately following that language "unless said trust shall be sooner

determined." This language, without a doubt, is ambiguous because it provides for a fixed *and* an indeterminate date for termination in the same instrument, without at the same time providing the means of determining which date should be used. In other words, unless extrinsic evidence is examined to determine what the intention of the settlor was at the time of the execution of the Trust Instrument, it is impossible to determine when it should terminate. The Court has examined such evidence and has concluded 1] that it was the intention of the settlor that the Trust would be "determined" long prior to the expiration of twenty years following the last survivor; 2] that all of the natural ores and surface rights would be disposed of prior to that time since it was anticipated that the mining of 500,000,000 tons of natural ore would take approximately fifty years [Arms Exhibit 3 and Burlington Northern Exhibits 19 and 22]; and 3] that at the end of that period of time, even though there was taconite on these lands, it still would not be merchantable ore, that the lands would thus have no further value, and that the Trust should be terminated. This is well borne out, if not conclusively established, in a document prepared by Robert I. Farrington, former comptroller-vice-president of Great Northern, designated as Arms Exhibit 3. In that document he states as follows:

> "Where a trust is entered into by individuals, the law prescribe[d] [sic] that it must be made for the benefit of certain people, and that it can run for but a certain number of years after the death of some person or persons who were alive at the time the trust agreement was entered into. *We figured that it will take probably fifty years to mine out the ore in the ore lands; consequently the trust must run for at least fifty years.* As it can only run for twenty years after

> the death of the survivor of the parties named in the trust agreement, it was necessary, of course, to name a lot of young children and to name several of them. For instance: Suppose Mr. James J. Hill had been named as a single party instead of all the children who were named, and that he should die in five years. Then the trust could last for only 25 years, while, as above stated, *it is expected it will take fifty years to mine out the ore.* Suppose that they had simply named Louis Hill's three children, all three of them might die within five or ten years, in which case the trust would terminate before all the ore was mined out. By naming as many people as were named, the probabilities are that several of them at least will live for thirty or forty years, so that the trust which will extend for twenty years after the death of the last one of them would run for fifty or sixty years.
>
> "You and Jack were named with a number of other children, so that *there would be enough young people to assure one or two of them at least living sufficiently long to permit the entire ore to be mined out during the life of the trust agreement.*" [Emphasis Supplied] [Arms Exhibit 3]

The Trustees have the full power to sell or otherwise dispose of any or all of the property and, after paying the usual expenses, must distribute annually to the certificate holders not only the income from said properties but *the proceeds of any sales of property made at any time.* [See paragraph 4, Arms Exhibit 70-A] The Trust further provides, in Paragraph 17, that after the expiration of the twenty years next following the death of the last survivor of the measuring lives, the Trustees are to immediately wind up the affairs of the Trust and, after paying all expenses, are to distribute all monies to certificate holders

and convey and transfer to Lake Superior Company, Limited, or its successors, all property except said monies. As previously pointed out, there is an inherent ambiguity in having a defined term in a trust document and having in the same document a provision for an undefined term, or, in other words, providing for the termination of the trust at an unspecified earlier date. Such language and the resultant ambiguity are clearly contained in this instrument. Moreover, there is an inherent ambiguity in the language which provides for the disposition of all property, both income and corpus, during the lifetime of the trust to the designated beneficiaries, and at the same time appears to provide for the retention of the property until the fixed term of the trust has expired and thereafter provides for a distribution of that property to a different designated person or entity.

F. THE PURPOSES OF THE TRUST

The two principal purposes of this Trust have been recited previously. The primary one, and of greater significance, was the fact that James J. Hill was interested in securing the freight revenues from the transportation of iron ore and, secondarily, he desired to give the entire beneficial interest in the trust-held property to the certificate holders. These purposes are well illustrated in the testimony of James J. Hill and statements made by him; for example:

> ". . . We wanted to secure a share of that iron tonnage for our railroad, and their road running into and their control of the Mahoney [Mahoning] mine, which at that time was being opened up, and a considerable shipper, we bought their property. The railway portion of it was turned over to the railway, and the mineral lands were put in trust for the benefit of the

> shareholders of the Great Northern Railway." [Arms Exhibit 7, pp. 10-11]
>
> * * * * *
>
> "Q. And your purchase of these lands was to secure freight for transportation on behalf of the Great Northern Railway Company?
>
> A. Yes sir." [Arms Exhibit 7, p. 30]
>
> * * * * *
>
> "I bought that property so as to get control of the transportation of that ore, which was important to that portion of the road, which had practically no business." [Arms Exhibit 1, p. 3171]
>
> * * * * *
>
> "My purpose was to secure the shipment of ore from these properties for the Great Northern; *and the profits from the mines, if there were any profits, for the stockholders of the Company.*" [Arms Exhibit 8, p. 11]

That the stockholders of Great Northern were to benefit ratably by this Trust is clearly set forth in the Resolution of the Great Northern Board of Directors:

> "Resolved, Further, That the said trust be and is hereby created *for the benefit pro rata of those persons* who shall be shareholders of this Company registered and appearing as such upon its books at the close of business on the 6th day of December, A.D. 1906, and of their assigns under and by virtue of assignments made in accordance with the provisions of said trust agreement * * *." [Arms Exhibit 18, p. 3]

While it is argued that the Trust Instrument in Paragraph 17 appears to create a reversionary interest of some sort, it is clear from the documents and the intent as

gleaned from those documents that no such interest was contemplated. For example, Hill clearly understood and so testified that the stockholders of the Great Northern Railway were to become *the sole beneficiaries of the property held in trust.* [Arms Exhibit 1, p. 3170] At various times both before and after the creation of the Trust, Hill repeatedly made clear that "the iron ore properties are held in trust for the benefit of the Great Northern shareholders" [Arms Exhibits 24d and 24e], that "the value of the ore certificates" is "in the ore itself" [Arms Exhibit 24i], and that "the stockholders were put in possession of *all* the benefits accruing from the whole transaction." [Arms Exhibit 8, p. 11] [Emphasis Supplied] Moreover, the certificates, themselves, indicated that the Trust was established "for the ratable benefit of the shareholders of the Great Northern Railway Company." [Arms Exhibit 8] The fact that everyone understood that all of the iron ore was to be mined out within forty to fifty years [Arms Exhibit 3, Burlington Northern Exhibits 19 and 22] is also very persuasive in determining whether the so-called reversionary interest created by Paragraph 17 was to be anything more than a reversion of cut-over, mined-out land, if that.

Incidentally, it probably should be noted at this point that whatever reversionary interest was created in Paragraph 17 of the Trust Instrument, which according to the instrument was to revert to Lake Superior Company, Limited, was assigned to the Great Northern Railway Company pursuant to an agreement dated February 3, 1913. [Arms Exhibit 48] The assignment of the so-called reversionary interest was couched in the following terms, to-wit:

> "The Lake Superior Company does assign, transfer and set over to the Great Northern Railway the following described property, to-wit:

> *"Reversionary Interest*
>
> "All interest, reversionary or otherwise, which the Lake Superior Company, Limited, has under and by virtue of the provisions of that certain agreement, and especially of the seventeenth paragraph thereof, dated the 7th of December, 1906, by and between said Lake Superior Company, Limited, and Louis W. Hill, James N. Hill, Walter J. Hill and Edward T. Nichols, or to any property of any nature whatsoever now held by said Louis W. Hill, James N. Hill, Walter J. Hill and Edward T. Nichols, as trustees under said agreement." [Arms Exhibit 48]

In Paragraph 3 of that agreement the Great Northern assumed "all obligations and liabilities of the [Lake] Superior Company and agrees fully to perform the same." This language absolutely guarantees the present certificate holders an interest in perpetuity in the ore properties. Great Northern's so-called reversion must be read in light of Paragraph 3 and thus is, at best, an obligation to maintain the predecessor trust, Lake Superior Company, for the benefit of the present certificate holders. No one in this litigation disputes the fact that the Lake Superior Company was a trust or a holding company for the benefit of the stockholders of the Great Northern Railway Company. [Burlington Northern Brief, pp. 90 to 91] Since Burlington Northern would succeed to whatever obligations Lake Superior had through the assignment [Arms Exhibit 48], it would have to carry out the provisions of the contract of October 20th, 1899, and those of the express or implied trust created by James J. Hill for the benefit of the shareholders of Great Northern when he formed Lake Superior Company and transferred the ore properties to it. If Lake Superior Company was a trust as Burlington Northern concedes [Burlington

Northern Brief, pp. 90 and 91], the assignee of Lake Superior would have to carry out that trust. The so-called reversion is nothing more than a perpetuation of the present trust but without a termination date. This, in essence, is a merger of the legal and beneficial interests in the present certificate holders, giving rise to the right of immediate title and possession.

G. REASONS FOR ESTABLISHING THE TRUST.

While the purposes of the Trust are perfectly clear, the reasons for establishing the Trust and the pre-existing trust in Lake Superior Company, Limited, are equally clear. In the first place, the Great Northern had no charter power to own any interest in the ore land. This was well understood by its president, James J. Hill, and he told the Knutson Committee:

> "The Great Northern Railway Company, as I have repeatedly said, could not have any ownership in or carry on mines in Minnesota; it has no charter for anything of the kind." [Arms Exhibit 7, p. 33]

And again before the Knutson Committee he said in response to a question:

> "Q. I am not disposed to be technical about the matter. Under its charter can the Great Northern Railway Company deal in mining lands or in stocks of other corporations?
>
> A. No, sir." [Arms Exhibit 7, p. 74]

And at a later point:

> "Q. And your reason for organizing it was because under your charter you supposed the Great Northern Railway Company had no right to do this kind of business?
>
> A. Well, we knew it hadn't." [Arms Exhibit 7, p. 76]

To the Congressional Committee Hill said:

> ". . . I do not think that, as a corporation, the Great Northern Railway Co. could operate mines. It might operate a coal mine for its own use, but I do not understand that it could go into the operation of mining iron ore." [Arms Exhibit 1, p. 3172]

Moreover, Robert I. Farrington, the comptroller and subsequent vice-president of Great Northern, stated as follows:

> "The so-called ore lands were purchased by Mr. Hill individually; the Great Northern did not have the charter right to own, lease or operate them; . . ." [Arms Exhibit 10, pp. 84-85]

Secondly, under the law of Minnesota, a railroad, with one exception, could not own land, the exception being "other than as may be necessary for the proper operation of its railroad." *Minnesota General Laws,* Chapter 204, Section 3, effective July 1, 1887. While this statute has since been repealed, it was in force at the time of the creation of the Trust in Issue and its antecedent trust, the Lake Superior Company, Limited. Thirdly, the Interstate Commerce Act was a vehicle standing in the way of the Great Northern Railway's transportation of commodities owned by it. Even before the enactment of the Commodities Clause of the Hepburn Act, the Interstate Commerce Commission had held in *Grain Rates of Chicago, Great Western Railway Company,* 1897, 7 Interstate Commerce Reports 33, that it was a violation of the Interstate Commerce Act for a railroad to transport commodities owned by it; that doctrine was upheld before the United States Supreme Court in *New York, New Haven and Hartford Railway Company vs. Interstate Commerce Commission,* 1906, 220 U.S. 361.

On June 29, 1906, an amendment was passed to the Interstate Commerce Act which, in this litigation, has become familiarly known as the Commodities Clause of the Hepburn Act; that legislation made it unlawful for a railroad to transport, except for use in its own business, any commodity:

> "*mined or produced by it*, or under its authority, or which it may own in whole or in part, or in which it may have any interest, direct or indirect . . ." [Emphasis Supplied.] Ch. 3591, Stat. 584, Section 1.

James J. Hill was cognizant of this statute and cognizant of the fact that the railroad could not own ore property directly or indirectly if it wished to garner the iron ore freight revenues. He testified as follows before the Congressional Steel Hearings:

> "The Chairman: You do not claim that the Great Northern Railway Co., under the present interstate-commerce act, could own and operate the Mahoning mine as a merchant mine?
>
> Mr. Hill: I have just said it could not." [Arms Exhibit 1, p. 3172]

Finally, the personal philosophy of James J. Hill required him to sever any ownership interest in the ore lands from both the Great Northern and himself. He repeatedly made this clear in the steel hearings and in testimony before the Knutson Committee:

> "Senator Clapp. As touching upon the subject of the private car, what is your opinion of the ownership of the carrier united in the same person in the production and distribution of the product? Ought that to be prohibited?
>
> Mr. Hill. Senator, you are coming on tender ground, but I will answer that question.

> Senator Clapp. I thought I might be.
>
> Mr. Hill. We are here to speak out in meeting. I think *that every railway officer in this country should be disqualified from having any interest, directly or indirectly, in any large producer of traffic*, whether it is a coal mine or a factory or a mill or anything else, on a line of railway where he is on the pay roll.
>
> Senator Clapp. And the reason for that suggestion is what?
>
> Mr. Hill. That he can not be fair to the other fellow and punish himself.
>
> Senator Clapp. And the opportunity is such that it can not be detected and prevented?
>
> Mr. Hill. It is so easy, if there is a great demand for coal in one direction, or for some commodity in one place, for him to help one fellow and forget the other. We have made it a rule (and *it never can be done for a moment on our road*, and I have always been very glad that the rule is in effect) that if a man wants to work for himself in any particular at any point on the line of the road, he must first sever his connection with the company; and it saves us a lot of trouble. And I think that in some cases it might help to reduce rates on natural products like coal, very, very materially if there was a fair field, or a square deal, or whatever you like to call it." [Arms Exhibit 33, pp. 1521-1522] [Emphasis Supplied]

* * * * *

> "We have always had a rule that nobody connected with the road can carry on any business where he is dealing with the railroad. Now, I could not hold those lands and carry them for myself without violating that rule. I expected that they would be turned over for the benefit of the shareholders. I was under

no obligation to turn them over, I could have kept them for myself. I turned them over and trusteed them for the benefit of the shareholders." [Arms Exhibit 7, p. 30]

• • • • •

"I didn't want to carry on the ore business personally, for the reason that I had made it a rule that nobody working for the company, myself or anyone else, could have any business that called for their transacting business with the company, anything along the railway where the company was interested in the carriage." [Arms Exhibit 7, pp. 131-132]

One other bit of historical background is essential to a decision in this case. The use of a trust as a vehicle to mine ore lands which would become exhausted in approximately fifty years came about as a result of some adverse court decisions which prevented Hill and his associates from employing a holding company to operate the mines. The early history of the Great Northern is one of various attempts at monopolistic practices and violations of the Antitrust Laws [See *Northern Securities Company vs. U. S.*, 193 U.S. 197; *Pearsall vs. Great Northern Railway Company*, 161 U.S. 646] In the *Northern Securities* case, James J. Hill and his associates, along with the associates of J. P. Morgan, caused to be organized the Northern Securities Company on November 13, 1901. The purpose of this company was to serve as a holding company for the stock of both the Northern Pacific Railway Company and the Great Northern Railway Company. It would also have been used as a vehicle to hold the various ore properties as is evident from the argument made in the *Northern Securities* case by George B. Young who, incidentally, was the draftsman of the Trust in Issue. In his argument before the Supreme Court, he stated as follows:

". . . and like the company originally projected, the enlarged company [referring to Northern Securities Company] was to be authorized and was expected to acquire shares in coal mines and *in industrial enterprises of utility to the railways, but whose stock the railway companies could not hold,* and also to be a financial as well as an investment company, with power in that capacity to aid the operations of the railway companies, or of any other companies whose shares or securities it might hold." [Page 258 of 193 U.S.] [Emphasis Supplied]

Since the Lake Superior Company had a duration of only twenty years and was organized in 1899, some vehicle had to be found to continue the interests of the shareholders of Great Northern in the ore properties. As was pointed out by Mr. Young in his argument, the Northern Securities Company was the natural vehicle for this purpose, but it was struck down by the United States Supreme Court in its October, 1903, term as being a violation of the Antitrust Laws; thus, but for that decision, the Trust in Issue would have been a corporation, and the certificate holders would have had a pro rata legal interest in the ore properties by way of shares of stock. What is important, however, is that the argument made by the draftsman of the Trust in Issue clearly demonstrates that there was an intent that the shareholders of Great Northern Railway Company have *all* of the benefits of the ore properties regardless of how long those ore properties might continue to be mined.

H. THE CHANGE OF CIRCUMSTANCES.

Finally, the substantial change of circumstances that has been wrought since the institution of the Trust in Issue should be chronicled. In the late 1950s, magnetic

taconite finally became economically feasible to mine. At the present time the Trustees have 381,657,132 tons of commercially mineable taconite committed to present plants. In addition, the Trustees have leased lands containing 159,320,838 tons of magnetic taconite which are not under lease. Of the tonnage that is committed to present plants, it is estimated that it will take approximately sixty years to mine it. Of the tonnage that is not committed to present plants, there is no way of foreseeing when this tonnage might be mined, and this is similarly true of the tonnage which is not under lease. [Arms Exhibit 64]

In addition to the foregoing tonnages, there is possibly an equivalent tonnage of magnetic taconite that is not commercially mineable today. The reason for this is that it is not economically feasible to mine such taconite when it lies under such a thick overburden of both raw earth and non-magnetic taconite layers. [Arms Exhibit 64]

Besides the magnetic taconite, there is a vast tonnage of taconite "sometimes in layers above or below the magnetic taconite," which is referred to as non-magnetic taconite; however, while there are known metallurgical methods to recover it, there are no commercial plants to treat it. It is estimated that the trust properties might contain as much non-magnetic as magnetic taconite. [Arms Exhibit 64]

Because of these vast tonnages, it is conceivable that mining of taconite from the ore properties could run over a period of a hundred years from the present time. By contrast the mining of natural ores will be completed by the end of this year. [Arms Exhibit 64]

II. COURT AUTHORITY AND JURISDICTION FOR INSTRUCTIONS

M.S.A. 501.33 provides that upon the petition of any person appointed as a trustee, the District Court shall consider the application to confirm his appointment and specify the manner in which he shall qualify. Thereafter, the District Court shall have jurisdiction of the trust as a proceeding *in rem*.

M.S.A. 501.35 provides that after a trustee has been confirmed, he may at any time thereafter petition the Court for instructions in the administration of the trust or for a construction of the trust instrument.

While the original Petition of the Trustees was for confirmation and instructions, all matters relating to confirmation have been concluded by the Court, and the necessary orders have been issued. The Court thus has jurisdiction over the Trust and, having confirmed the appointment of the Trustees, now has jurisdiction to provide instructions in accordance with the Petition and Amended Petition of the Trustees.

III. COMMENT AND CONCLUSIONS

A. BURLINGTON NORTHERN ARGUMENTS.

While Burlington Northern has submitted a rather lengthy brief, its approach to the Trust Instrument, and the problems inherent in it, is rather simplistic. It has, for example, endeavored to get the Court to apply the Uniform Principal and Income Act to this trust on the theory that the trust is the typically classic one where income is paid to the beneficiaries and all other principal or corpus of the trust is reserved for the remainderman. This is simply not the intent or design of this trust. The trust assets consist entirely of iron ore lands, and they

have, for a period of approximately sixty-five years, been regularly mined, and the underlying land regularly sold or abandoned. As a matter of historical fact, at the time of the creation of the Trust in Issue, the companies whose stock was placed in trust and their subsidiaries owned in fe_ or controlled by leasehold estate approximately 49,000 acres of land. [The original mining companies have since been dissolved, and the Trustees now own the lands directly.] In addition, they owned an undivided one-half interest in approximately 16,000 acres. This meant that they had an interest of one kind or another in a total of approximately 65,000 acres, and, if the 16,000 acres are viewed at half value because of the one-half interest, there was a net acreage of approximately 57,000 acres. By December 31st, 1943, this acreage had been reduced to approximately 22,700 acres, and it should be noted that sale or tax forfeiture accounted for a reduction of approximately 35,310 acres. Of the approximately 20,000 acres that were sold, the proceeds of these sales were received by the corporation selling the land and were then distributed by the corporation to the Trustees as dividends. When those dividends were received by the Trustees, they, in turn, distributed them to the certificate holders, or beneficiaries, of the trust. [Burlington Northern Exhibit 57] The trust clearly gives the Trustees the power to distribute both income and *principal* to the beneficiaries, and furthermore gives them the power to terminate the trust at a time prior to the date of termination provided in Paragraph 17. The Uniform Principal and Income Act simply cannot apply to a situation where the trust is essentially operating as a business entity, viz. a corporation, and there is full power to dispose of the corpus. The arguments of Burlington Northern in its brief, therefore, at pages 32 and 33 relative to the application of the Uniform Principal and Income Act are viewed simply as being inapposite insofar as they pertain to this trust.

Similarly, the argument which is made at pages 52 and 53 of the Burlington Northern brief relative to the distinction between money and property is also a rather strained interpretation of the trust instrument and its practical construction over a sixty-five-year period. Burlington Northern argues that "monies" do not include proceeds of sales of stock [or other property], and "that in making distribution to the Certificate Holders there is no authority to entrench upon 'property' [corpus]." This simply does not accord with the facts, and it is hardly worth the trouble for Burlington Northern, after observing the Trustees for sixty-five years distribute not only income from the sale of iron ore *but the proceeds* from the sales of property, to assert that the Trustees are limited to the distribution of income. As a matter of fact, the sale of iron ore is a sale of corpus in the wasting asset context which we have here. The Trust Instrument clearly authorizes the Trustees to distribute both income and corpus at any time they choose and not less than annually; the Trustees, themselves, have construed the instrument in this fashion and have followed this line of thinking for the past sixty-five years, with the full knowledge and acquiescence of Burlington Northern and its predecessor, the Great Northern Railway. Examples of language which the Trustees have used to support their position to distribute the proceeds from the sale of approximately 20,000 acres of trust property to the certificate holders are as follows:

> "IN TRUST, HOWEVER, to hold, use and dispose of the said property and all income and proceeds thereof, . . ."
>
> * * *
>
> "3. Said trustees shall, out of the moneys so received by them, or *out of the proceeds of any sales*

made by them or any of said shares, pay all expenses of said trust, . . ."

• • •

"4. After payment made of or provision made for the expenses of said trust, the said trustees shall, . . . at least once in every year, distribute and pay such portion of the net income *or proceeds of the property held by them* as such trustees, . . . to the persons [et cetera] . . ."

• • •

"9. The trustees shall have full power, during the continuance of this trust, to sell . . . or *otherwise dispose of all or any part of the shares of stock hereby transferred to them, or any other property* that may have become subject to this trust; . . ." [Arms Exhibit 70a] [Emphasis Supplied]

The ultimate strain on language appears in the Burlington Northern brief at page 54, where it is argued that the proceeds of any sales as they are designated in Paragraph 3 of the Trust relate clearly to corpus "but the proceeds of property held by them designated in Paragraph 4 of the trust instrument refers only to income."

One other endeavor by Burlington Northern that was troubling, was the effort made in its brief to create the illusion that the Great Northern was actually in control of the ore properties originally, and that it was under its direction and control that all these various documents were executed and the Trust in Issue created. [Burlington Northern Brief, pp. 84, 90, 106, 110, 113, and 119] An example of this effort is contained on page 84 of the brief, where it is said:

> "Shortly after the first ore properties came under the control of Great Northern Railway Company

> through the purchase of the Duluth, Mississippi and Northern Railroad and the Duluth, Superior and Western Railroad with their land holdings, which included the North Star Iron Company and the West Mesabi Land Company, the heart of the properties which were eventually transferred to Great Northern Iron Ore Properties Trust, it was recognized that the operation of the ore properties created certain legal and corporate problems. . . ."

This statement is utterly contrary to historical fact. If it were true, then the trust was and is no more than a scheme by Hill and his associates to violate the laws of the United States and Minnesota and the Charter of the Great Northern Railway. It is abundantly clear that the Great Northern did not come into control of, or set apart, or transfer to the Lake Superior Company, the ore properties. This was done by the Hills, the properties were paid for by the Hills, and any additional ore properties that were acquired by Lake Superior Company were acquired with income generated from the original ore properties that had been transferred by the Hills to Lake Superior. [Arms Exhibit 16a] While the Trust in Issue was designed to insure to the degree possible that the Great Northern would be in command of the freight revenues generated from the transportation of iron ore, it had one other basic purpose, and that was to insure that the stockholders of Great Northern and not the corporation would have the full benefits of the iron ore property. The latter purpose was fundamental to the legality of Great Northern's monopoly of the freight revenue. This Court is fully satisfied that James J. Hill would have gone to any lengths to insure these purposes, including violation of the laws of the United States, if necessary. Cf. *Northern Securities Company vs. U. S., supra.* How-

ever, the only practical construction of this trust based upon the extrinsic evidence introduced is that it was a vehicle designed not to violate the law. While it is an ambiguous document, it did not and could not create for the Great Northern a vested reversionary interest, because, if it had, it would have violated the law. One thing is certain, the Great Northern was completely and utterly divorced from any interest, legal or otherwise, in the ore properties, and its claim today to windfall benefits is utterly devoid of merit. While Burlington Northern in its brief strongly urges that the Trust Instrument is unambiguous, its repeated attempts to strain the meaning of the language in it, fully supports the Court's view of its inherent ambiguities.

Burlington Northern cites the opinions in two cases: *In the Matter of the Estate of Margaret Rea Agnew Bunker, Deceased,* 77 Misc. Rpt. 320, 137 N.Y. Supp. 104 [1912], and *Bowdoin, et al vs. Fairchild, et al,* 103 At. 715 [R.I., 1918], as supporting its position on the construction of the trust. [Burlington Northern Brief, pp. 149-152] In both cases the Court was faced only with the question of whether the Great Northern Iron Ore Properties Certificates of Beneficial Interest should be treated as capital or as income in an estate; and the court in both cases concluded that the certificates should be treated as principal; however, in both cases that construction is based upon the premise that *there was no distribution of property or of the proceeds of the sales of property among the certificate holders but only of income collected and distributed by the trustees.* This is utterly erroneous and is directly contrary to the facts in this matter; there is no question but what millions of tons of iron ore have been sold, which is property in the truest sense, and thousands of acres of property, omitting the iron ore, have been disposed

of, the proceeds of both of which have been distributed to the certificate holders; from this it can hardly be said there has not been a substantial distribution of property or a distribution of the proceeds of sales of property, contrary to the conclusion in the *Bunker* and *Bowdoin* cases. While urging the strange rationale of these cases upon the Court, at another point in its brief Burlington Northern acknowledges that real estate was sold and in some cases the surface rights were forfeited. [Burlington Northern Brief, pp. 54 and 55] What it omits pointing out, however, is that after the properties were sold, the proceeds of those sales were distributed to the certificate holders. [Answer and Amended Answer by the Trustees to Burlington Northern Interrogatory No. 14]

B. SOME ADDITIONAL VIEWS OF THE SO-CALLED REVERSION

This Memorandum has been addressed primarily to the idea that the Trust Instrument is ambiguous, and that its ambiguities are compounded by the substantial change of circumstances. We know, for example today, that it is likely that ore will be mined from these lands for perhaps another hundred years, long after the fixed termination date in the trust. But if the Trust Instrument is examined against the background of extrinsic facts and surrounding circumstances, the settlor's manifest intent becomes clear, and certain conclusions are inevitable.

1. THE REVERSION WOULD VIOLATE THE LAW AND RAILWAY CHARTER.

As previously pointed out in this Memorandum, the primary reason for creating this trust was to secure the traffic revenues generated by the iron ore traffic. In the early leases there were traffic clauses which tied in

the ore traffic revenues to the Great Northern Railway Company. [Arms Exhibit 64, Burlington Northern Exhibit 15] Of course, since the trust for many years was dominated by trustees who were contemporaneously officers and directors of the Great Northern, there was no question but what that railway company would carry the iron ore traffic whether there were traffic clauses or not. If, as is now suggested by Burlington Northern, its predecessor, the Great Northern, originally had and subsequently maintained control over the ore properties, temporarily parted with possession of them, but continued to have a legal, vested reversionary interest in them, then such clauses injected into the leases executed by the Trustees of Great Northern Iron Ore Properties Trust, tying the traffic to the Great Northern Railway, were plainly illegal, because they were violations of 1] the Commodities Clause of the Hepburn Act, 2] the Interstate Commerce Act, and 3] the tenor of the United States Supreme Court cases covering such matters; moreover, they would also have violated the Charter of the Great Northern. It is clear that the railroad had to be completely divorced from the ore properties at all times and remain divorced therefrom in order not to violate the laws of the United States and its Charter. After all, as Burlington Northern notes in its reply brief at page 40: "The Commodities Clause [of the Hepburn Act] enacted in 1906 remains unchanged to this day."

If, as is now contended by Burlington Northern, the assignment transferring Lake Superior's interest in these ore properties to Great Northern [now Burlington Northern] turned over to Great Northern a legal, vested reversionary interest in them, and if that reversionary interest at the time it ripened consisted of ore properties containing unmined iron ore, Great Northern, now Burlington Northern, would then be in violation of the Commodities Clause of the Hepburn Act and its own Charter.

It is clear from an examination of the Trust in Issue, the underlying documents, and particularly the testimony of James J. Hill that there was no intention of ever having Great Northern come into possession, legal or otherwise, of the ore properties as long as those properties contained ore which required railway shipment.

2. THE REVERSION AS A RECEPTACLE FOR WORTHLESS PROPERTIES.

As Burlington Northern points out in its brief at page 110, and concedes, everyone thought in terms of natural ores and agreed that those ores would be exhausted in a matter of forty to fifty years. Upon the exhaustion of the natural ores the trust would terminate. [Arms Exhibit 3, Burlington Northern Exhibits 19 and 22] Thus, there would never be any need to wind up the trust in accordance with the provision of Paragraph 17. If there was to be any reversion, it was to be no more than a receptacle for worthless properties. As stated by Burlington Northern in its brief at pages 54 and 55: "The value of the iron ore properties has always been in their mineral content, not in the surface. In fact, the surface was a burden because of taxation, a burden which, if permitted to continue, would have harmed the economic stability of the trust and the ability of the Trustees to provide for the mining of the ore beneath the surface. *The surface was useless because all timber had been cut.* Therefore, portions of the surface of the ore properties were sold, donated, or forfeited for the good of the continued operation of the ore business." [See Burlington Northern Exhibit 57]

If, by chance, the mining of natural ore had lasted until about the time of the fixed termination date of the trust the cut-over, mined-out land would have gone to the reversioner.

3. THE REVERSION AS A PERPETUAL TRUST.

If the language of Paragraph 17 of the Trust Instrument is taken literally, and all of the remaining property is to be transferred to Lake Superior Company, Limited, or its successor, which in this case would be Burlington Northern, then that property according to the assignment of the successor [Arms Exhibit 48] is to be transferred subject to whatever obligations or liabilities Lake Superior Company had toward the stockholders of the Great Northern Railway. [Paragraph 3, Arms Exhibit 48] Those obligations arise by virtue of the terms of the contract of October 20, 1899 [Arms Exhibit 12], or pursuant to the terms of what the Court views as an express or implied trust, based upon the often expressed intention of James J. Hill and Louis W. Hill, his son, when transferring all of the ore property to Lake Superior Company by way of deed of trust or in trust in some fashion for the benefit of those stockholders. [Arms Exhibits 1, 5, 7, 24d, and 24e] In other words, the so-called reversionary clause, if operable, would merely transfer the property once again to Lake Superior Company and its assigns in trust for the benefit of the stockholders of the Great Northern Railway Company as they existed as of December 6, 1906; today those persons are the present certificate holders, since they are the successors in interest of the original stockholders; it would thus appear that the certificate holders are entitled to have the full fee interest in the ore properties, since by the predecessor and present trusts they are to have the beneficial interest in them until they are exhausted. Anybody who is assigned an unrestricted beneficial interest in a property until that property is exhausted to all intents and purposes has a fee simple interest in it. Certainly a beneficial interest of limited duration must merge with a beneficial interest of unlimited duration so as to entitle the beneficiaries to the fee.

Cf. *Simmons vs. Northwestern Trust Co.*, 136 Minn. 357, 162 N.W. 450. Moreover, if trustees have the authority to dispose of all of the income and corpus of the trust during the term of the trust, and pay all proceeds thereof to the beneficiaries, the beneficiaries have a legal as well as beneficial interest in the trust assets.

C. SUMMARY AND CONCLUSIONS

The pattern of mineral exploration in mining has always been the 1] discovery, 2] depletion of those minerals which are cheapest to mine and highest in value, and 3] exhaustion and abandonment. [Arms Exhibit 89, p. 373] Having these principles in mind, which James J. Hill surely must have, it is quite apparent that since taconite was viewed as country rock and there was no interest in the magnetic taconites until 1913 [Arms Exhibit 89, p. 381], and since beneficiation of the low-grade ores did not really start until the second decade of the twentieth century [Arms Exhibit 89, p. 375], the true term of the trust was really to be the approximate fifty years that it would take to mine out the high-grade, natural ores. There was never any intent on the part of the settlor that there be any kind of reversion left that would have any monetary value. As a matter of fact, based on the past history of the Trust in Issue, once the natural ores had been fully mined out, had there been no other ores to mine, the surface rights would have been abandoned to avoid the payment of real estate taxes. It is quite apparent that the idea of a true reversion simply was not within the contemplation of the parties at the time of the execution of the Trust Instrument, or at any time thereafter.

It is most appropriate that the trust be terminated at this time, not only because the mining of the natural

ores has been completed but because, as the Court views it, the certificate holders have a sufficient beneficial and legal interest in the trust assets so as to entitle them to a transfer of those assets at this time. This is based upon the idea that anyone who has a third-party beneficiary interest in a contract running into perpetuity, such as the interest the Great Northern Railway stockholders had in the contract of October 20, 1899, or is a beneficiary of an express or implied trust running into perpetuity, is entitled to the legal as well as equitable interest at this time. The testimony of James J. Hill at the various committee hearings relative to the creation of Lake Superior Company and its purposes fully corroborates this position.

Taconite became a commercial product in the mid-1960s, and it has been determined that there are millions of tons of taconite to be mined out of the ore properties in question, which will take perhaps one hundred years or more. Burlington Northern, of course, looks upon this as a windfall which was contemplated by the trust. The settlor's intent was quite to the contrary. Whatever of value was in the lands was to belong to the certificate holders. The mining of taconite was never dreamed of at the time of the execution of the trust, and even as late as 1951, when there was no taconite income, the Trustees in their report to the certificate holders indicated that commercial production would not be started for many, many years, and that the experimental stages in commercial production which had been conducted for some time would continue for years before the mining of taconite would be commercially feasible. [Arms Exhibit 65, Report of 1951]

The idea of a windfall to Burlington Northern is a concept of very recent origin and one which was undoubt-

edly conceived as a result of the proceedings herein. Neither Burlington Northern nor its predecessor, Great Northern, had ever contemplated that the reversion would have any commercial or monetary value. They had never referred to it in their records, never shown it in any way in their books of account, and had never placed any value upon it either prior or subsequent to the commercial production of taconite. [See Burlington Northern Response to Request for Admissions, No. 1aa, Tr. 418-419] Moreover, Burlington Northern and its predecessor, Great Northern, recognized that under the laws of the United States as they were at the time of the execution of the trust and at all times since that time, the railway could never become the owner of commercially mineable ore properties, even if it did not intend to transport them over its railway.

As a consequence of the foregoing, the Court has reached certain conclusions in regard to this trust:

1] The trust contemplated that all of the trust purposes would be fulfilled within approximately fifty years of its creation because all of the natural ore would be mined within that time.

2] The trust did not contemplate the economic feasibility of mining magnetic or non-magnetic taconite.

3] The settlor intended that the trust would not extend to or beyond the designated term.

4] A trust which empowers the trustees to dispose of all income and corpus during the lifetime of the trust for the benefit of the designated beneficiaries and permits the termination of the trust after such disposition and before the designated term of the trust is reached, creates, in essence, an interest in fee simple in those beneficiaries.

5] A trust which empowers the trustees to transfer a reversionary interest to a third party, who, in turn, must maintain the trust for the benefit of the original beneficiaries in perpetuity, creates, in essence, an interest in fee simple in those beneficiaries.

6] There has been a substantial change in circumstances since the creation of the trust, in that magnetic taconites in vast quantities have become commercially mineable and have been mined since approximately the mid-1960s. These taconites and possibly the non-magnetic taconites will be mined beyond the presently designated term of the trust.

7] The change of circumstances does not change the fact that all of the original trust purposes have been fulfilled because the natural ores have been fully mined, thus making the trust ripe for termination.

A. The beneficiaries have enjoyed all the revenues from the natural ores.

B. The Great Northern and its successor have enjoyed all the revenues derived from transporting the natural ores.

8] The change of circumstances does not require the continuation of the trust until the stated term is reached because the certificate holders are entitled to both the beneficial and legal interest in the trust property at the present time and are entitled to a transfer of those interests to them at the earliest practical time.

IV. INSTRUCTIONS

It is the view of this Court that the trust should be wound up at the earliest opportunity. For the same reasons that the Lake Superior Company and the Trust

in Issue were formed, it would not be practical to divide the interests of the individual certificate holders into the various properties of the trust, since there are approximately 10,000 certificate holders. It would be far more prudent to keep the Great Northern Iron Ore Properties together. It certainly would not be practical to convert the assets to cash even though the trustees have the authority to do so. Therefore, upon the winding up of the trust, a corporation should be formed in which the present certificate holders receive approximately the same pro rata share in the corporation as they presently have in the trust. This will, in effect, carry out the intent of the settlor as it will give to the beneficiaries all assets of value upon termination. This would not be a Paragraph 17 termination, but rather would fall under the indeterminate term language of the IN TRUST clause. After all, it must be remembered that the Trust Agreement is ambiguous, and Paragraph 17 is one of the most outstanding examples of that ambiguity, when read with other language in the trust.

The Court is satisfied that the certificate holders should have both the beneficial and legal interest in this property transferred to them at the present time by reason of the language in the Trust Agreement and the language contained in the predecessor Lake Superior Company contract dated October 20, 1899 [Arms Exhibit 12]; but even more compelling than these documents is the clear and unmistakeable intent of James J. Hill and his associates in creating Lake Superior Company, Limited, and in creating the Trust in Issue.

The Trustees are instructed to cooperate with the Arms Petitioners in preparing a proposal to be submitted to the Court by May 10, 1974. Such proposal should contain the form of corporate vehicle, including proposed ar-

ticles of incorporation and by-laws, which will be used as a successor to the trust, itself, and the manner of its possible listing on one of the Stock Exchanges. The proposal should also contain a timetable suggesting the period within which the Trustees should endeavor to wind up the trust, as well as suggestions concerning the winding-up process. Upon receipt of such proposal, the Court will determine whether additional hearings are necessary.

In reaching these conclusions, the Court recognizes the invaluable assistance rendered by counsel for the Arms Petitioners and is agreeable to setting a hearing for a determination of their attorneys' fees at a time convenient to counsel and the Court. That matter was previously reserved for future hearing.

H. S., *Judge*